

IMPLEMENTATION BY THE DEPARTMENT OF  
DEFENSE OF THE NATIONAL SECURITY  
PERSONNEL SYSTEM

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HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

APRIL 14, 2005

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# **IMPLEMENTATION BY THE DEPARTMENT OF DEFENSE OF THE NATIONAL SECURITY PERSONNEL SYSTEM**

**THURSDAY, APRIL 14, 2005**

U.S. SENATE,  
COMMITTEE ON ARMED SERVICES,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:37 a.m., room 325, the Caucus Room, Russell Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, McCain, Inhofe, Collins, Talent, Levin, Kennedy, Lieberman, Reed, Akaka, Bill Nelson, and Clinton.

Committee staff member present: Judith A. Ansley, staff director.

Majority staff members present: David M. Morriss, counsel; and Diana G. Tabler, professional staff member.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Creighton Greene, professional staff member; Peter K. Levine, minority counsel; and Arun A. Seraphin, professional staff member.

Staff assistants present: Benjamin L. Rubin and Pendred K. Wilson.

Committee members' assistants present: John A. Bonsell, assistant to Senator Inhofe; Arch Galloway II, assistant to Senator Sessions; Mackenzie M. Eaglen, assistant to Senator Collins; Lindsey R. Neas, assistant to Senator Talent; Mieke Y. Eoyang, assistant to Senator Kennedy; Frederick M. Downey, assistant to Senator Lieberman; Darcie Tokioka, assistant to Senator Akaka; William K. Sutey, assistant to Senator Bill Nelson; Eric Pierce, assistant to Senator Ben Nelson; and Andrew Shapiro, assistant to Senator Clinton.

## **OPENING STATEMENT OF SENATOR JOHN WARNER, CHAIRMAN**

Chairman WARNER. Good morning, everyone. We welcome everyone for a very important subject. A number of my colleagues have urged that this hearing be held, and indeed that Secretary England urged that this be handled, so we're delighted to do it.

I must say if I may by reference I have been privileged to be a part of the Federal workforce for many years in many jobs over my lifetime. I have always felt I have a special interest and responsibility to the Federal workers and therefore I'm delighted to be here this morning with my colleagues.

We meet to receive the testimony on the implementation of the National Security Personnel System (NSPS), a system which impacts nearly 700,000 men and women of the Department of Defense (DOD) civilian workforce, throughout the world.

We welcome our first panel, the Honorable Gordon England, currently Secretary of the United States Navy, and Daniel G. Blair, the acting Director of the Office of Personnel Management (OPM). We will also hear from the second panel, and I will introduce them as they approach.

Congress enacted the NSPS as part of the National Defense Authorization Act in 2004. This was a challenge. But in my view, a very necessary piece of legislation giving DOD broad new authorities and flexibilities to manage the civilian workforce, at a time when the Defense Department is undergoing some of the most dramatic changes in its entire history, given the extraordinary challenges facing our United States security system.

The Department has now begun to take the first important step to implement the new system. I wish to acknowledge the hard work of Senators Collins and Lieberman, who as chairman and ranking member of the Committee on Homeland Security and Government Affairs have played a key role in the adoption of this legislation.

Also, it's appropriate at this time to acknowledge the many contributions of the civilian workforce of the DOD, the men and women who have served tirelessly over years with our military personnel in the defense of our Nation.

As I have said, I was privileged to have at one time, when I was Secretary of the Navy, just in the Navy Department alone, over 600,000 civilian employees. At that time, of course, the overall Department was much, much larger.

Our civilian employees are scientists and engineers, medical personnel, technicians, teachers, and some of the finest senior executives in the Nation. They are also the welders and the electricians who daily risk their lives to maintain some of the most powerful technology and sophisticated weapons systems in the world.

The Nation owes all of those employees a great debt of gratitude, and we desperately need their services and their successors in the years to come. It comes as no surprise that the committee's concern about the transformation of the DOD's civilian personnel system which is now underway. The DOD sought flexibility and that flexibility has been granted. It's now our responsibility to work with the Department and OPM and with the representatives of the civilian workforce to make sure we get it right, and it works right.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT BY SENATOR JOHN WARNER

Good morning and welcome to this historic room of the United States Senate.

The committee meets today to receive testimony on the implementation of the National Security Personnel System—a system which impacts nearly 700,000 men and women of the Department of Defense civilian work force.

We welcome our first panel, the Honorable Gordon R. England, Secretary of the Navy, and the Honorable Daniel G. Blair, Acting Director of the Office of Personnel Management.

The committee will also hear from a second panel of experts. I will introduce the witnesses on the second panel later in this hearing.

Congress enacted the National Security Personnel System as part of the National Defense Authorization Act for 2004. This was a challenge but—in my view—nec-

essary legislation which gave the Department of Defense broad new authorities and flexibilities to manage the civilian workforce again, this was a challenge to meet the Nation's rapidly changing national security demands. The Department has now begun to take the important first step to implement this new personnel system.

I wish to acknowledge the hard work of Senators Collins and Lieberman who, as chairman and ranking member of the Committee on Homeland Security and Government Affairs, have played a key role in passing the legislation covering the civilian personnel changes in the Department of Defense.

It is also appropriate at this time to also acknowledge the many contributions of the civilian workforce of the Department of Defense—men and women who have served tirelessly over the years with our military personnel in the defense of this great nation. As Secretary of the Navy in the 1970s, I had the privilege of serving with a civilian workforce in the Department of the Navy of over 600,000. It gave me great confidence to know that our sailors and marines worked side by side with their fine civilian counterparts as a team.

Our civilian employees are scientists and engineers, medical personnel and technicians, teachers and some of the finest senior executives in the Nation. They are also the welders and electricians who daily risk their lives to maintain some of the most powerful, technologically sophisticated weapon systems in the world, and firefighters and security personnel who also risk their lives for our safety. The Nation owes those who have dedicated a career to civilian service in the Department of Defense a great debt of gratitude, and as our military leaders have testified before this committee, we simply cannot get the job done without this fine civilian work force.

It should come as no surprise that this committee is concerned about the transformation of the DOD civilian personnel system which is now underway. The Department of Defense sought flexibility, and that flexibility has been granted. It is now our responsibility to work with the Department of Defense, with OPM, and with representatives of the civilian workforce to see that we get it right.

DOD must keep faith with its work force, by rewarding their achievements and protecting their basic rights. The regulation jointly issued by the Department of Defense and the Office of Personnel Management on February 14, 2005 raises these issues:

- How will pay be determined for each of the pay bands which replace the civil service general schedule?
- How will performance be evaluated?
- What issues are still on the table for collective bargaining with local and national unions?
- How can labor be assured of independent review and resolution of disputes?

During the course of this hearing, we will explore issues related to pay, evaluation and recognition of performance, employee rights in the appeal of adverse actions and the new labor relations system which the Department intends to put in place.

The decision made, almost 2 years ago, to move forward with the National Security Personnel System, was supported by final vote strongly in favor of reform.

As the "meet and confer" period which was required by law commences on April 18, 2005, the Department has an opportunity to work with all parties on whether or how to proceed on matters needing clarification. The committee expects to see progress when a final rule is presented to Congress for review in accordance with the law.

Chairman WARNER. Senator Levin.

#### **STATEMENT OF SENATOR CARL LEVIN**

Senator LEVIN. Mr. Chairman, first let me thank you for calling this hearing. The proposed NSPS will have a direct impact, as you pointed out, on hundreds of thousands of employees at the Department of Defense.

It will define how they are hired, how they are promoted, how much they are paid, how they are disciplined, and what rights they will have or not have to challenge any of the decisions.

I recognize the tremendous amount of work that went into this proposal. I also would like to thank Secretary England in particular for the positive contribution that he has made in both the tone and substance of the discussion.

Mr. Chairman, the first test of any new personnel system is how it's received by the employees who must live under it. The proposed NSPS is less likely to be successful if it doesn't have the broad support of the DOD employees who must live with it.

The NSPS is unlikely to gain such acceptance unless the Department's employees have confidence that the proposed system will treat them fairly and will respect the important contribution that they make to the DOD and to the security of our Nation.

The new system must do more than provide flexibility to Department of Defense managers. It must also provide standards, establish expectations, and incorporate mechanisms to ensure transparency and accountability for decisions that these managers will make.

In this regard, I am deeply troubled by a number of aspects of the draft regulation, which appear to send a message to the Department employees that the leadership of the Department of Defense is not interested in ensuring that they are treated with the fairness or equity that they deserve.

Last month I sent a memorandum to Secretary England outlining my concerns about four items: the exemption of all DOD issuances, so-called, from the collective bargaining requirement; the standard of review for adverse personnel actions; the ratification of national level bargaining agreements; and the composition of the National Security Labor Relations Board. I don't have time to go into all of these issues now. I'll explore a few more of them during my questions.

But I would like to just focus on one specific area as an example of what my concerns are. That area is the standard of review and appeals of adverse personnel actions against DOD employees. The relevant section of the draft regulation says that a proposed penalty against the Department of Defense employee may not be reduced on appeal unless "the penalty is so disproportionate to the basis for the action it has to be wholly without justification."

In those cases where the penalty is reduced, listen to this, the draft regulation says that "maximum justifiable penalty must be applied." That's unfair. It's harsh. It's extreme on its face. Instead of words like a fair penalty or an appropriate penalty will be substituted on appeal where the penalty is reduced, you have maximum penalty that can be justified. Why not the minimum penalty that can be justified?

Equally important is what the draft regulation does not say. It does not require either DOD officials or reviewing authorities to take into account any of the many factors that might justify a reduced penalty, such as employees' past record, whether the offense is intentional or advertent, the extent to which the employee was on notice or warned about the conduct in question, and the consistency of the penalty with those imposed on other employees for the same or similar offenses. Instead, the regulation says that in every case, the Merit System's Protection Board (MSPB) must apply the "maximum justifiable penalty."

The message that that provision sends is that the Department is concerned only about discipline, and not interested in fairness. Even convicted criminals are not always subjected to the maximum permissible penalty. I don't believe that that standard of review is



consistent with the standard of review which we set out in the NSPS legislation 2 years ago when we enacted it. I also believe that the Department is going to have difficulty convincing its employees that this new system will treat them fairly as long as it continues to insist that the appropriate penalty in adverse action cases is always the severest penalty that is not so disproportionate to the basis for the action as to be wholly without justification.

I believe, Mr. Chairman, that our witnesses here today are seeking to establish a fair and effective new personnel system for the Department of Defense. I believe that they are open to rethinking issues like the ones that we are going to raise here today. It's critically important that they be open. That way, I assume that the goals of our legislation can be achieved. Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator Levin. Other colleagues wish to make an opening statement?

Senator Kennedy.

Senator KENNEDY. If I could, Mr. Chairman, and you're typically gracious to permit those of us who are very interested in making a comment. I want to thank you very much, and Senator Levin, for having this hearing. This is a matter that we have talked about and you had agreed to have this hearing so that we would have a chance to go into some of the issues which are involved, so I'm very, very grateful.

I just want to underline a couple of points here, Mr. Chairman. As has been pointed out, the Civil Service Personnel System was first put in place over 40 years ago by President Kennedy, and later amended under President Carter in 1978.

The changes being made today are the most sweeping changes in the personnel system ever. I support the modernization but it can and must be done without gutting vital workers' rights and protections.

This system is going to have a very dramatic effect and impact on some 6,400 Defense civilian employees in my State of Massachusetts. The eradication of the collective bargaining rights will affect all of those workers, the new untested subjective pay processes, and weakened due process rights will affect will nearly 3,000 Massachusetts workers in the first round of implementation. These include employees at the Air Force base at Hanscom, the electronic systems center and the Air Force research labs, Boston Navy Yard, the Air Force police at Westover, the Army Defense Reserve Forces, and the Otis Air National Guard.

I believe that the workers deserve better. They deserve to be able to maintain bargaining rights over their schedules, safety, and health in deployments outside of the regular work locations. They deserve a just appeals process when they have been treated unfairly and they deserve to have their salary and pay increases depend on fair, transparent criteria, not subjective judgment.

Mr. Chairman, just finally, I have reviewed in preparation the statements that were made by Secretary Rumsfeld before the Committee and I'll have a chance to quote those briefly during the questioning period. But as many of us remember, the Civil Service programs were put in to avoid political patronage, and to create a system that was going to be based on merit and performance, which for all the reasons that we don't have to go into today was

a very desirable objective and one which in any kind of modernization is certainly one that I hope we can help continue.

We may have to modernize the system, but the idea of having a transparent merit system is one that I would think that we could all agree on. I don't think that's 19th century, what might have been. That ought to be a 21st century way of proceeding. Because it wasn't in the 19th century way, but it was a system of patronage and we got away from that. That was the great need that was essential, so that there was going to be pay based on merit. I think these pay bands that are outlined in this, move us in a direction that's much more subject to the subjective.

Second, on the issue of collective bargaining, most modern managers welcome the opportunity to get input from their workers. That's basically the collective bargaining system, so that they know what is happening out there and they have a good way of exchanging ideas.

That enhances productivity and also health and safety and other issues which you raised. So it seems to me that all of us want to see the modernization and adaptability, those are good words, but we also don't want to throw the baby out with the bath water on some tried and true principles which I think have served the country well in terms of the future. I thank the chair.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT BY SENATOR EDWARD M. KENNEDY

While I strongly support modernization, I am deeply concerned by the Department's proposal to change the rules governing the civilian defense workforce. The proposal—which was developed without meaningful input by affected workers or their representatives—seems a calculated attempt to deny our invaluable defense employees their basic rights. Rather than bringing us into the 21st century, the National Security Personnel System (NSPS) would set workers' rights back to the 19th century, and that is unacceptable.

First, the NSPS would unlawfully undermine workers' collective bargaining rights. Under current law, the Department is required to negotiate with employee representatives over important workplace issues, including overtime policy and other scheduling issues, safety and health programs, and deployment away from regular work locations. A neutral third party steps in to adjudicate when there are disputes between labor and management. Under NSPS, however, the Department could prohibit bargaining on any subject, and could wipe out existing collective bargaining agreement provisions on any subject, merely by issuing a regulation, directive or policy on those subjects. In addition, labor disputes would be adjudicated by a new board within the Department—clearly not an impartial third party. This is not collective bargaining by any stretch of the imagination—it is an unlawful and unfair stripping of employees' collective bargaining rights.

Second, NSPS would effectively eliminate an individual employee's right to a fair appeals process. Under current law, an employee who suffers an adverse employment action can pursue an appeal through the Merit Systems Protection Board (MSPB), an independent agency established to protect workers in the civil service against potential abuses by agency management. Under NSPS, employees lose their right to a fair appeals process, because the Department of Defense has given itself the authority to remand, modify, affirm, or reverse decisions by judges at the MSPB. MSPB would have extremely limited authority to review or change any decisions imposed by the Department. This system is clearly unfair to employees, allowing the fox to guard the proverbial henhouse of employee rights.

Finally, under current law civilian employees benefit from a clear, transparent, objective pay system—the same general schedule that applies to all Federal employees. While NSPS does not spell out the details of the new pay system the Department would impose, what we do know suggests that civilian defense employees will be vulnerable to their supervisors' whims, rather than congressional action, to determine whether and how much of a pay raise they will receive. NSPS replaces the objective statutory pay system with subjective performance-based pay systems with-

out clear, established performance criteria. The new pay system will ultimately lead to lower salaries and slower salary growth for the vast majority of hard-working Defense employees.

The changes will hurt 700,000 workers nationwide, including 6,400 in Massachusetts. These patriotic Americans are protecting us around the world, and we owe it to them to protect their rights. They take pride in their work, they love their country, and they've served it with distinction, often for decades. They build command and control systems at Hanscom Air Force Base. They design ships at the Boston Navy Yard, and they protect our military installations at bases across Massachusetts.

These men and women deserve better. They deserve the right to bargain over important issues such as the safety and health of their workplaces, and when they're required to work overtime hours. They deserve a fair appeals process when they've been wronged. They deserve pay increases that depend on fair criteria, not the bias of their managers. I hope the outcome of today's hearing will convince the Department to go back to the drawing board and submit a lawful plan for reform that protects workers' basic rights.

Chairman WARNER. Thank you, Senator. Any of my other colleagues?

Senator Nelson.

Senator BILL NELSON. Mr. Chairman, I was thinking about—the Secretary of the Navy is here—and the NSPS with the necessity for having a carrier in Japan. I'll just defer that discussion.

Chairman WARNER. That will give him a few moments to reflect what answer he is going to provide.

Senator Akaka.

Senator AKAKA. Mr. Chairman, thank you for calling today's hearing on the NSPS as proposed by the DOD and OPM. I want to take the time to share some of the information that I have received from folks in Hawaii, as well as in other places.

Of course, I join you, Mr. Chairman, in welcoming Secretary England back to the committee along with Director Blair and our other distinguished witnesses, who will share with us their views on NSPS.

As the ranking member of this committee's Readiness and Management Support Subcommittee, as well as the Senate's Federal Service Subcommittee, I have heard from many Department of Defense employees across the Nation who do not support the implementation of these regulations as drafted.

Mr. Chairman, I cannot recall a single issue in my 28 years in Congress that has generated more anxiety among Federal workers in Hawaii than NSPS. Now, this is especially true of the more than 16,000 civilian DOD employees, many of whom work at Pearl Harbor Naval shipyard.

I believe that government's most important asset is the Federal workforce, whose dedication, commitment, and courage are demonstrated every day. Any reorganization such as NSPS will fail if the concerns of employees go unanswered. Congress was told the DOD needed a new personnel system that was "flexible and contemporary," to meet its national security mission. However, NSPS should not reduce current rights and protections of the Civil Service in its aspirations for flexibility.

I used a recent public comment period to lay out my concerns in a 16-page letter and focus on the areas of pay, performance and staffing, labor relations, veterans' preference, and adverse actions and appeals. Although I feel that all of these areas pose serious challenges to maintaining a fair and impartial Civil Service, I be-

lieve the limitations and the scope of collective bargaining are particularly egregious.

In testimony before the Government Affairs Committee 2 years ago, Secretary Rumsfeld testified that the labor management provisions in chapter 71 of title 5 which governs the Federal workforce would not be repealed.

However, the NSPS proposal effectively eliminates collective bargaining by restricting bargaining over approximately 75 percent of current bargaining issues. The regulations permit DOD to issue a regulation directive or policy that trumps provisions of existing collective bargaining agreements.

The proposed regulations would eliminate negotiation of overtime policy, shift location, safety and health programs, flex-time compressed work schedules, and deployments. If such restrictions are implemented, it is no wonder that DOD employees are voicing concern. By restricting the ability of employees to bring their concerns to the table and essentially eliminating collective bargaining, the changes proposed in NSPS will undermine the agency mission, lower employee morale, and make the Department an employer of last resort.

Let me be clear that the concerns being relayed to me are not just on rank and file employees. I am also hearing from Federal managers, the men and women who must execute NSPS and be accountable for its success. Just yesterday I was asked by a manager how he was to implement the new plan on July 1 without any information or guidance from DOD. He said he was told by a superior that, and I quote him, "implementation is a journey." Then he was referred to the NSPS Web site.

Mr. Chairman, NSPS appears to be, after hearing all of these folks, a trip without a destination or without a compass and without a map. I urge that implementation of NSPS be done in a manner that respects the rights and protection of the DOD workforce, provides adequate transparency, resources, and training, maintains fair and credible appeals systems, sustains an environment in which labor and management coexist, and provides all workers, both managers and employees alike, opportunities to provide meaningful input on agency policies. Thank you very much, Mr. Chairman. I look forward to the hearing.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT BY SENATOR DANIEL K. AKAKA

Mr. Chairman, thank you for calling today's hearing on the National Security Personnel System (NSPS) as proposed by the Department of Defense (DOD) and the Office of Personnel Management (OPM).

I join you in welcoming Secretary England back to our committee, along with Director Blair and our other distinguished witnesses who will share with us their views on NSPS.

As the ranking member of this committee's Readiness and Management Support Subcommittee, as well as the Senate's Federal civil service subcommittee, I have heard from many Department of Defense employees across the Nation who do not support implementation of these new regulations, as drafted. Mr. Chairman, I cannot recall a single issue in my 28 years in Congress that has generated more anxiety among Federal workers in Hawaii than the NSPS. This is especially true of the more than 16,000 civilian DOD employees, many of whom work at the Pearl Harbor Naval Shipyard.

I believe the government's most important asset is the Federal workforce, whose dedication, commitment, and courage are demonstrated every day. Any reorganiza-

tion, such as NSPS, will fail if the concerns of employees go unanswered. Congress was told that DOD needed a new personnel system that was, “flexible and contemporary” to meet its national security mission. However, NSPS should not reduce current rights and protections of the civil service in its aspirations for flexibility.

I used the recent public comment period to layout my concerns in a 16-page letter and focused in the areas of pay, performance, and staffing; labor relations; veterans preference; and adverse actions and appeals. Although I feel that all these areas pose serious challenges to maintaining a fair and impartial civil service, I believe the limitations on the scope of collective bargaining are particularly egregious.

In testimony before the Governmental Affairs Committee 2 years ago, Secretary Rumsfeld testified that the labor-management provisions in chapter 71 of title 5, which governs the Federal workforce, would not be repealed.

However, the NSPS proposal effectively eliminates collective bargaining by restricting bargaining over approximately 75 percent of current bargaining issues. The regulations permit DOD to issue a regulation, directive, or policy that trumps provisions of existing collective bargaining agreements.

The proposed regulations would eliminate negotiation on overtime policy, shift rotation, safety and health programs, flex time and compressed work schedules, and deployments. If such restrictions are implemented, it is no wonder that DOD employees are voicing concern. By restricting the ability of employees to bring their concerns to the table and essentially eliminating collective bargaining, the changes proposed in NSPS will undermine agency mission, lower employee morale, and make the Department an employer of last resort.

Let me be clear that the concerns being relayed to me are not just from rank and file employees. I am also hearing from Federal managers—the men and women who must execute NSPS and be accountable for its success.

Just yesterday I was asked by a manager how he was to implement the new plan on July 1 without any information or guidance from DOD. He said he was told by a superior that “implementation is a journey,” and then he was referred to the NSPS Web site.

Mr. Chairman, NSPS appears to be a trip without a destination without a compass—and without a map. I urge that implementation of NSPS be done in a manner that respects the rights and protections of the DOD workforce, provides adequate resources and training, maintains fair and credible appeals systems, sustains an environment in which labor and management coexist, and provide all workers both managers and employees alike—opportunities to provide meaningful input on agency policies.

Thank you Mr. Chairman. I look forward to our hearing today.

Chairman WARNER. Thank you, Senator Akaka. We note the presence of the chairman of the committee that was working on the issue before and made a significant contribution to this legislation. Would you like to say a few words, Madam Chairman?

Senator COLLINS.

Senator COLLINS. Thank you, Mr. Chairman. I do have an opening statement, but in the interest of time, I’ll submit it for the record. I would note, as the Senator has indicated, that the Homeland Security and Governmental Affairs Committee has a great deal of jurisdiction in this area over the rules for the civilian workforce at DOD, and that Senator Levin and I worked very hard to craft an alternative to the plan that the Department first presented 2 years ago.

I have followed the implementation very closely, along with Senator Voinovich, who chairs the appropriate subcommittee and who has held hearings on this matter. A month ago, I wrote to our two witnesses to express some specific concerns about the proposed regulations. I have not yet received a reply to that letter. I understand one is being worked upon, but I hope to bring up some of those issues today. Thank you, Mr. Chairman, and thank you for holding this hearing.

[The prepared statement of Senator Collins follows:]

## PREPARED STATEMENT BY SENATOR SUSAN COLLINS

Senator Warner, thank you for holding this hearing as part of our joint efforts to ensure the Department of Defense creates a new personnel system in collaboration with its workforce that supports the Department's national security mission while, at the same time, treats workers fairly and protects their fundamental rights. As Chairman of the Homeland Security and Governmental Affairs Committee and a member of the Armed Services Committee, I take the responsibility of Federal workforce policy very seriously.

Two years ago, the Department of Defense delivered to Congress a far-reaching proposal to restructure the Department's civilian personnel system. Unfortunately, the proposal lacked important safeguards to protect good employees. To strike a better balance, I worked hard with several of my colleagues, in particular Senator Levin, to craft an alternative that would give the Department the authority that it needed to create a more responsive system, while providing appropriate employee protections.

Secretary England, I want to thank you for your continued involvement in the progression of NSPS, and acknowledge your efforts to make key modifications in the initial development stages in response to my previous concerns. I hope that you will set a tone of inclusiveness for the upcoming meet and confer process. Similar to the personnel system it is designed to produce, the meet and confer period must treat the employees and their elected representatives as full participants in the process.

Many have been frustrated by the lack of detail during the development of the proposal. The recent publication of the proposed regulations has provided Congress as well as the DOD civilian workforce an outline of the new personnel system.

After reviewing the proposed regulations, I believe there is room for improvement. For example, additional details must be provided to avoid confusion within the pay-for-performance system. The move to a new compensation system represents both a fundamental and cultural shift for the Department's civilian workforce. Defining the details within the final regulations will help ensure fairness and allow employees to understand how their individual performance is linked to the Department's overall mission and ensure consistency across occupational groups.

In addition, the "wholly without justification" standard of review proposed for appeals of adverse actions must be modified to conform to the evidentiary standard required by the statute.

During debate on the authorizing measure, the Department repeatedly claimed that it had no desire to waive the collective bargaining rights of its employees. Thus, I fully expect that the final labor relations system developed by the Department, OPM, and the employee unions will abide by existing labor-management principles, such as the duty to bargain in good faith.

As the meet and confer period begins, I remain confident that both sides can craft a system that demonstrates its support for employees who perform the essential services that the Department depends on every day. While there are real differences of opinion at this time over many of the proposed changes, meeting in good-faith and carefully balancing the needs of the Department and its workforce can only improve the final regulations. For the new system to succeed, employees' voices must be heard and their specific suggestions and concerns, whether provided in written comments or raised during the meet and confer process, must be addressed.

Striking the appropriate balance among the numerous options available, though not easy, will be imperative to ensuring the Department has the dedicated civilian workforce it needs to ensure its long-term success and to support our men and women in uniform.

Chairman WARNER. Thank you. Gentlemen, we will proceed formally as each member does have extensive very well prepared statements, which will be placed in the record in their entirety. So you may proceed as you wish on your abbreviated remarks as you would like to make.

**STATEMENT OF HON. GORDON R. ENGLAND, SECRETARY OF  
THE NAVY**

Secretary ENGLAND. Mr. Chairman and members of the committee, thanks very much. Thanks for the opportunity to be here today with my partner from OPM, Dan Blair, to discuss the proposed design of NSPS, and I emphasize it's still a proposed design.

The timing of this hearing is very opportune as a 30-day public comment period to the proposed broad enabling regulations just ended. The meet and confer period with our unions will begin next week. We respect our unions and we look forward to that upcoming dialogue. Thus the detailed design phase of NSPS is just now starting, so your questions, comments, and suggestions will be most helpful as we go forward into the detail design phase.

Let me first assure this committee that the DOD is absolutely committed to implementing NSPS in a fair, credible, and transparent manner. Broad participation is the cornerstone of our development process. To date there have been more than 100 focus groups, more than 50 townhall meetings, and an open Web site to gain input.

Literally tens of thousands of suggestions and comments have been received from employees, local and national union representatives, supervisors, managers, human resource practitioners, and the public at large. Additionally, the DOD and OPM have conducted 10 meetings with officials of the unions that represent DOD employees.

Other stakeholder groups such as the National Academy of Public Administration, the Coalition for Effective Change, the Partnership for Public Service, Veterans' Service Organizations, the Federal Manager's Association, and other nonunion employee advocacy groups have all been solicited.

DOD and OPM have also met with the Government Accountability Office (GAO), the Office of Management and Budget (OMB), and the Department of Homeland Security (DHS) to receive their input and to keep them apprised of the NSPS progress.

NSPS is all about people, DOD's most valuable resource. The NSPS team is dedicated to make NSPS a win for the employees and a win for national security. Recognizing the importance of people, Mr. Chairman, I do want to introduce to you today Mary Lacey, who is here. She is one of our most important NSPS leaders, she serves as the program executive officer.

Mrs. Lacey has over 30 years experience with DOD. She started as an intern, recently ran some of the demonstration projects that were a forerunner to the NSPS system, so she is knowledgeable and experienced about designing and implementing NSPS and she fully understands the absolute necessity for adequate training before implementation.

Now, although NSPS will not begin until after the meet and confer, after the 30-day congressional notification period, and after publishing the final regulations in the Federal Register, I can tell you with certainty that current Civil Service protections of merit and fairness will not change in the new NSPS.

NSPS will not remove whistle blowing protections. It will not eliminate or alter access of DOD employees to the equal opportunity complaint process. It will not remove prohibitions on the nepotism or political favoritism. It will not in any way diminish veterans' preference. It will not end collective bargaining. It will not result in a loss of Civil Service jobs or opportunities. We hope just the opposite. It will not give DOD unilateral authority to change the Civil Service system, that is leave, benefits, training,

travel, allowances. The list goes on. All those are unaffected by NSPS.

What NSPS will do is to put in place a modern flexible human resources management system, appeals system, and labor system to replace a cumbersome framework of rules and processes designed for a different time. So, Mr. Chairman, let me first thank you, and thank the entire Congress for this very important legislation that enabled the development of NSPS, enables what we are doing today for DOD and the opportunity to have these discussions with you today. Again, I thank you for scheduling this hearing at this very opportune time. Thank you, Mr. Chairman.

[The prepared statement of Secretary England follows:]

PREPARED STATEMENT BY HON. GORDON R. ENGLAND

Mr. Chairman and members of the committee. Thank you for the opportunity to appear before you to discuss the proposed design of the National Security Personnel System (NSPS). Dan Blair, Acting Director of the Office of Personnel Management (OPM), our partner in developing NSPS, joins me today. We are pleased to appear before you to discuss the recently published proposed regulations for NSPS. We wish to formally thank the entire Congress for granting the Department of Defense (DOD) the authority to establish, in partnership with OPM, a new civilian human resources management system to support our critical national security mission. DOD and OPM take this task seriously and recognize the responsibility to balance our vital national security mission with protecting the interests of our most valuable resource, our people.

In November 2003, Congress granted the DOD the authority to establish a new human resources management system, appeals system, and labor relations system to replace a framework of rules and processes designed for a different time. The world has changed, jobs have changed, missions have changed—and our Human Resource (HR) systems need to change as well to support a new and unpredictable national security environment. Our civilians are being asked to assume new and different responsibilities, to be more innovative, agile and accountable than ever before. It is critical that DOD sustains its entire civilian workforce with modern processes and practices, particularly a human resources management system that supports and protects our employees' critical role in DOD's total force effectiveness.

NSPS gives DOD that opportunity—an opportunity to establish a more flexible civilian personnel management system and to make the Department a more competitive and progressive employer at a time when the country's national security demands a highly responsive civilian workforce. The NSPS is a transformation lever to enhance the Department's ability to execute its national security mission. It's a key pillar in the Department's transformation—a new way to manage its civilian workforce. NSPS is essential to the Department's efforts to create an environment in which the total force functions and operates as one cohesive unit.

NSPS has unprecedented potential to greatly enhance the way DOD manages its civilian workforce, but it is also critical that we take care of our most valuable asset—our people. The proposed NSPS design follows a set of guiding principles that act as a compass to direct our efforts throughout all phases of NSPS development. "Mission First" and support of our national security goals and strategic objectives have been and remain paramount, but while also respecting the individual and protecting workers' rights guaranteed by law, including the laws pertaining to veterans in the civil service. The new system emphasizes performance, and it values talent, leadership and commitment to public service. Accountability at all levels—our employees, supervisors and senior leadership—will be critical and all will be held accountable for their respective roles in a performance-based system. In keeping faith with our employees and the public we serve, NSPS is based on the principles of merit and fairness embodied in the statutory merit system principles, and it will comply with all other applicable provisions of the law.

THE COLLABORATIVE PROCESS

In addition to the opportunities that NSPS offers, it presents great challenges. Shortly after enactment of the NSPS statute, we contacted union leaders to solicit their input. In January and February 2004, joint meetings were held to exchange ideas and interests on a new labor relations system for DOD. During this time,



many stakeholders, including members of this Committee, voiced concerns about our plans and process.

In response, the Department engaged in a broad, comprehensive review of our design and implementation strategy. In April 2004, senior DOD leadership approved a new collaborative process that the Department has since been using to design and implement NSPS. This process was designed by senior leaders and experts representing various elements within DOD, OPM, and the Office of Management and Budget. Using a bold, innovative approach, the senior leaders adopted the Defense Acquisition Management model as a way to establish the requirements for the design and implementation of NSPS. These senior leaders recommended Guiding Principles and Key Performance Parameters (KPPs), which defined the minimum requirements for NSPS. They also recommended establishing a Senior Executive and Program Executive Office (PEO), modeled after the Department's acquisition process. Shortly thereafter, an NSPS PEO was chartered as the central DOD program office to conduct the design, planning and development, deployment, assessment, and full implementation of NSPS. Mrs. Mary Lacey was appointed as the NSPS Program Executive Officer to provide direction to and oversight of the PEO office, a joint program office staffed with representatives from across the Department, including component program managers who are dual-hatted under their parent component. At OPM, the Director designated George Nesterzuk, the Senior Advisor to the Director on Defense issues, to lead OPM activities in the joint development of the NSPS.

An integrated executive management team composed of senior DOD and OPM leaders provides overall policy and strategic guidance to the PEO and advises the NSPS Senior Executive. The PEO meets and consults with this team, the Overarching Integrated Product Team (OIPT), 8 to 10 times a month. Charles Abell, Principal Deputy Under Secretary of Defense for Personnel and Readiness, co-chairs this OIPT along with Mr. Nesterzuk of OPM. The Senior Executive meets with the PEO and OIPT at least twice a month to direct the process and to measure progress to plan.

Following the April 2004 decision to revise our design and implementation process, a series of additional meetings with the union leaders was initiated. Beginning in the spring of 2004 and continuing over the course of several months, the PEO sponsored a series of meetings with union leadership to discuss design elements of NSPS. Officials from DOD and OPM met throughout the summer and fall with union officials representing DOD civilians who are bargaining unit employees. These sessions provided the opportunity to discuss the design elements, options, and proposals under consideration for NSPS and solicit union feedback. A number of these meetings were facilitated by the Federal Mediation and Conciliation Service to ensure open and meaningful communication.

Since April 2004, DOD and OPM have conducted 10 meetings with officials of the unions that represent DOD employees, including the nine largest unions that currently have national consultation rights. These union officials represent over 1,500 separate bargaining units covering about 445,000 employees. These meetings involved as many as 80 union representatives from the national and local level at any one time, and addressed a variety of topics, including:

- (1) the reasons change is needed and the Department's interests;
- (2) the results of Department-wide focus group sessions held with a broad cross-section of DOD employees;
- (3) the proposed NSPS implementation schedule;
- (4) employee communications; and
- (5) proposed design options in the areas of labor relations and collective bargaining, adverse actions and appeals, and pay and performance management.

In keeping with DOD's commitment to provide employees and managers an opportunity to participate in the development of NSPS, the PEO sponsored a number of focus group sessions and town hall meetings at various sites across DOD. Focus group sessions began in mid-July 2004, and continued for approximately 3 weeks. A total of 106 focus groups were held throughout DOD, including at several overseas locations. There were over 1,000 participants, including employees, local union representatives, supervisors, managers, and human resources practitioners. Focus group participants were asked what they thought worked well in the current human resources systems and what they thought should be changed. Over 10,000 comments, ideas and suggestions were received during the focus groups session. These inputs were summarized and provided to NSPS working groups for use in developing options for the labor relations, appeals, adverse actions, and human resources design elements of NSPS.

In addition, town hall meetings were held in DOD facilities around the world during the summer and fall of 2004. These meetings provided an opportunity to communicate with the workforce, provide the status of the design and development of NSPS, respond to questions, and listen to their thoughts and ideas. I conducted the first town hall meeting at the Pentagon on July 7, 2004.

In July 2004, the PEO established working groups to begin the NSPS design process. Over 120 employees representing the military departments and other DOD activities and OPM began the process of identifying and developing options and alternatives for consideration in the design of NSPS. The working group members included representatives from the DOD human resources community, DOD military and civilian line managers, representatives from OPM, the legal community, and subject matter experts in equal employment opportunity, information technology, and financial management.

The working groups were functionally aligned to cover the six program areas:

- (1) compensation (classification and pay banding);
- (2) performance management;
- (3) hiring, assignment, pay setting, and workforce shaping;
- (4) employee engagement;
- (5) adverse actions and appeals; and
- (6) labor relations.

Each group was co-chaired by an OPM and DOD subject matter expert. Working groups were provided with available information and input from the focus groups and town hall sessions, union consultation meetings, data review and analysis from alternative personnel systems and laboratory and acquisition demonstration projects, the NSPS statute, the Guiding Principles and Key Performance Parameters. Additionally, subject matter experts briefed the working groups on a variety of topics, such as pay-for-performance systems, alternative personnel systems, pay pool management, and market sensitive compensation systems.

I personally addressed these individuals as they were about to embark on this process to ensure they understood the critical responsibility they were undertaking and the impact their work would have on the ability of the Department to more effectively accomplish its mission. Briefings and updates on progress and on the multitude of options developed were regularly received. You can be assured that these dedicated individuals took this task seriously and left no stone unturned as they reviewed and analyzed the multitude of ideas, options, and lessons learned that were all considered in this process.

In addition to reaching out to DOD employees and labor organizations, DOD and OPM met with other groups interested in the design of a new HR system for DOD. DOD and OPM invited selected stakeholders to participate in briefings held at OPM in August and September 2004. Stakeholder groups included the National Academy of Public Administration (NAPA), Coalition for Effective Change, Partnership for Public Service, veterans' service organizations, Federal Managers Association, and other non-union employee advocacy groups.

Before and after these stakeholder briefings, DOD and OPM responded to dozens of requests for special briefings. DOD and OPM also met with the Government Accountability Office, Office of Management and Budget, and Department of Homeland Security to keep them up to date on the team's activities.

DOD and OPM have worked hard to obtain the input of our employees and their representatives, managers and supervisors, and other stakeholders. A human resources system is being developed that has taken their concerns into consideration and that will create a work environment for our people to foster excellence and innovation and to reward our people accordingly. NSPS will provide our leaders and supervisors with flexibilities to better manage our people, while at the same time it will expand opportunities for our employees. It will mandate greater communication between managers and employees so that each and every employee will know what is expected and how their work supports the organization's mission.

#### THE PROPOSED REGULATIONS

The Secretary of Defense and the Director of OPM jointly issued the proposed regulations that were published in the Federal Register on February 14, 2005. This initiated a 30-day public comment period and provided another opportunity for input on the design of the system. The public comment period closed on March 16, 2005 and we are currently reviewing the thousands of comments we received from individual employees, interested citizens, professional organizations, employee unions, Members of Congress, and advocacy groups. Many of the comments are thoughtful, genuine, and raise legitimate points for evaluation. We will give full consideration to these public comments as we move forward in finalizing the NSPS regulations.

The Federal Register notice also served as the formal written proposal of the system for review and comment by our employee unions, as required by the NSPS statute. We encouraged them to participate in the public comment period as well. Comments were received from 12 national labor organizations representing DOD employees, including the United DOD Workers Coalition, which represents most of the DOD labor organizations. DOD and OPM have analyzed these recommendations, have given them serious consideration and we are about to begin discussions with the unions regarding their recommendations.

In recognition of the union's special status as our employee representatives, the NSPS statute provides for a "meet and confer" process with them for a minimum of 30 days. As required by the statute, we formally notified Congress on March 28, 2005 that we will begin the meet and confer process with employee representatives on April 18, 2005. We look forward to continuing our dialogue with our unions and, with the help of the Federal Mediation and Conciliation Service (FMCS), find common ground. Upon completion of the meet and confer process, the results and outcomes will be reported to Congress.

NSPS will not be implemented until after the meet and confer process, after the 30-day Congressional notification of the Department's intent to implement these systems, and after publishing the final regulations in the Federal Register.

Before describing the proposed design, here is what will not change:

- It does not remove whistle-blowing protections—employees will have the same protections they have today.
- It does not eliminate or alter access of DOD employees to the equal opportunity complaint process—again, nothing in NSPS will change the current protections employees have today.
- It does not remove prohibitions on nepotism or political favoritism—both will remain prohibited personnel practices and will not change under NSPS.
- It does not eliminate veterans' preference—veterans will retain their special status under NSPS.
- It does not end collective bargaining—while there will be changes, collective bargaining will not end. Bargaining unit employees continue to have the right to organize and bargain collectively.
- It does not give us a "blank check" to change the civil service system unilaterally—there are many areas that are unaffected by NSPS—leave, benefits, training, travel allowances—the list goes on.
- It will not result in a loss of jobs or opportunities for civil service employees—to the contrary, NSPS will create incentives for managers to turn to civilians first, not last, when many vital tasks must be done. This will ease the burden on our valuable men and women in uniform to do only those tasks that are uniquely military.

What NSPS will do is put a modern, flexible personnel system in place that is also credible, transparent, and fair to our employees. DOD will be able to hire the right people in a more timely manner, and to pay and reward our employees properly, adequately recognizing their contribution to the mission. Managers will be held accountable for making the right decisions and for managing their employees—all of their employees. Specifically, NSPS will provide for:

- A simplified pay banding structure, allowing flexibility in assigning work and a move toward market sensitive pay.
- A performance management system that requires supervisors to set clear expectations (linked to DOD's strategic plan) and employees to be accountable.
- Pay increases based on performance, rather than longevity.
- Streamlined and more responsive hiring processes.
- More efficient, faster procedures for addressing disciplinary and performance problems, while protecting employee due process rights.
- A labor relations system that recognizes our national security mission and the need to act swiftly to execute that mission, while preserving collective bargaining rights of employees as provided for in the NSPS statute.

The proposals for performance management are designed to foster high levels of performance and to ensure that excellent performance is recognized, rewarded, and reinforced. NSPS is designed to make meaningful distinctions in levels of performance and to hold employees at all levels accountable. Employees will be under the performance management system for an adequate evaluation period before making any performance-based adjustments to their pay. No employee will have their pay reduced when they are converted into NSPS.

One of the most important changes the proposed system offers is a stronger correlation between performance and pay plus greater consideration of local market

conditions in setting pay rates. Our proposal would eliminate the General Schedule pay system in favor of a new performance-based, market-sensitive pay system that includes three major features. First, NSPS emphasizes performance over tenure. Open pay ranges eliminate the “step increases” in the current system, which are tied to longevity. Second, pay will be adjusted by occupation or career group in each market, rather than a one-size-fits-all approach currently in practice. Third, performance pay pools will be established to ensure that employees will receive increases based on their performance.

Our proposed appeals system focuses on simplifying a complex, legalistic and often sluggish process that often disrupts operations. At the same time, the proposed system will ensure that employees receive fair treatment and that they are afforded the full protections of due process.

The proposed regulations were developed in consultation with staff of the Merit Systems Protection Board (MSPB), with extensive discussions over appellate options and alternatives. MSPB officials were particularly constructive and many of their suggestions are reflected in our proposed appellate procedures, including the retention of MSPB administrative judges (AJs) as the initial adjudicators of employee appeals of adverse actions. Although the NSPS law allowed DOD to establish an internal appeals process, we concluded that the potential advantages of creating a new infrastructure—greater efficiency of decisionmaking and deference to agency mission and operations, among them—could be achieved if MSPB administrative judges were retained but with procedural modifications. The modifications we propose will streamline the process without sacrificing employee protections.

Among those changes is a proposal to allow the Department to review initial decisions of the Administrative Judges to ensure that MSPB interprets NSPS and these regulations in a way that recognizes the critical mission of the Department and to ensure that MSPB gives proper deference to such interpretation. After review, the Department may affirm the decision, remand the case to the AJ for further adjudication, modify or reverse the decision, but only based on stringent criteria. In all adverse action cases, final Department decisions may be appealed to the MSPB, which retains limited review authority established in the NSPS statute. Ultimately, an employee or the Secretary may seek judicial review if still not satisfied with the appeal decision.

To balance some of the proposed changes, the Department will establish a single burden of proof standard. Currently, the evidentiary standards for performance and conduct actions differ, with performance-based actions requiring a lower standard of proof. That will no longer be the case—the Department’s adverse action decision will be subject to a single standard—the preponderance of the evidence—for all adverse actions, whether based on conduct or performance. To address concerns that the current system fails to adequately consider DOD’s critical national security mission, the proposed regulations also make it more difficult for administrative judges to substitute their judgment in mitigating penalties; however, the Department will ensure that managers consider a variety of important factors in each situation before determining an appropriate penalty.

The development process has been cognizant of the need to provide protections guaranteed by law to our employees. We were also mindful of a basic tenet of the civil service—preserving merit system principles—treating employees fairly and equitably and protecting them from arbitrary actions, coercion for partisan political purposes and personal favoritism, and protecting them against reprisal. The proposed appeals system will continue to provide our employees with these all-important protections.

The proposed labor relations construct balances our operational needs while providing for collective bargaining and consultation with employee representatives. In the face of a committed and unpredictable enemy, DOD needs to have authority to move quickly to prepare for and confront threats to national security. As such, the Department will not bargain over the exercise of rights impacting operations and mission accomplishment. NSPS will provide for consultation with employee representatives both before and after implementation when circumstances permit. Bargaining obligations will be retained concerning the exercise of the remaining management rights, such as certain personnel procedures. Although we are proposing to limit situations in which bargaining takes place, there will continue to be meaningful local bargaining over important matters. Because the new labor relations system is a critical, enabling component of NSPS, DOD plans to make the new labor relations provisions effective across the entire Department after the issuance of final regulations, and after notification to Congress as required by law.

The Department also proposes to create a National Security Labor Relations Board (NSLRB) to hear and resolve labor disputes. The NSLRB would be composed of at least three members appointed to fixed terms. In evaluating the merits of a

separate NSLRB that would largely replace the Federal Labor Relations Authority, with its Government-wide responsibilities, DOD and OPM put a high premium on the opportunity to establish an independent body whose members would have a deep understanding of and appreciation for the unique challenges the Department faces in carrying out its national security mission. The NSLRB will issue binding decisions on unfair labor practice (ULP) cases, to include scope of bargaining, duty to bargain in good faith, and information requests; certain arbitration exceptions; negotiation impasses; and questions regarding national consultation rights. FLRA will continue to determine appropriate bargaining units and supervise and conduct union elections as well as review NSLRB decisions using appellate standards. FLRA decisions will be reviewable by various Federal Circuit Courts of Appeals as occurs today.

#### IMPLEMENTATION—A PHASED APPROACH

Transformation is a process. The spiral concept will implement NSPS in successive waves—initially deploying the new personnel system to a number of well-chosen organizations for effective management of implementation, and to troubleshoot, evaluate, and report on the results in a timely manner. As with any new system, especially one with the size and complexity of NSPS, refinements will likely be necessary as the rest of the workforce is incorporated.

Although DOD will implement the labor relations system DOD-wide, the human resources system will be phased in, starting perhaps as early as July 2005. In the first spiral, up to 300,000 General Schedule (GS and GM), Acquisition Demonstration Project, and certain alternative personnel system employees will be brought into the system through incremental deployments over 18 months, with the first increment covering 60,000 employees. After an assessment cycle and the certification of the performance management system required by the NSPS statute are completed, the second spiral will be deployed. Spiral two, consisting of Federal Wage System employees, overseas employees, and all other eligible employees, will be phased in over a 3-year period, with full implementation achieved by 2007/2008.

Training is one of the most critical elements for a smooth and successful transition to NSPS. The Department is fully committed to a comprehensive training program for our managers, supervisors and employees. All employees will be trained to understand the system, how it works, and how it will affect them. The Department has a robust training infrastructure already in place to train and educate its personnel and we will leverage that infrastructure as we implement NSPS specific training. We have a dual training strategy to provide functional training on all elements of the NSPS system, as well as behavioral training, with the focus on the skills, attitudes and behaviors necessary to successfully adapt to NSPS. Some of the component behavior-based training has already begun. Other courses are in development and will be available to train all affected employees in advance of NSPS implementation.

#### SUMMARY

NSPS involves significant changes. While change is always difficult, it is necessary for the Department to carry out its mission and to create a 21st century system that is flexible and contemporary, will help attract skilled, talented and motivated people, and will also help us to retain and improve the skills of the existing workforce. NSPS will make it possible to hire critical skills more quickly so that DOD is better equipped to meet challenges such as those in the days immediately following September 11. NSPS will facilitate our ability to quickly deploy new technology to ensure that our military and civilians have the best equipment without delay. NSPS will eliminate limitations on managers that often result in the use of military and contract personnel to do jobs that could have and should have been performed by civilians, freeing up uniformed personnel to focus on matters unique to the military.

NSPS will provide our civilian employees with greater opportunities for career growth within the Department. Limitations imposed by classification standards will no longer preclude employees from expanding their scope of work so they will be able to broaden their career paths. NSPS will promote a performance-based culture and employees will be rewarded for individual performance and contribution to mission as well as teamwork. Managers will be able to offer competitive salaries to new and existing personnel so that we can attract and retain the best and brightest in our workforce.

DOD has over 20 years of successful experience with testing similar personnel flexibilities, namely in our personnel demonstration projects, at our laboratories and with our acquisition workforce—it is now time to expand those flexibilities to the

rest of the Department. NSPS will modernize a 50-year old, outdated civil service system, and allow us to attract, recruit, retain, compensate, reward, and manage our employees, with a focus on performance, flexibility, and accountability.

NSPS proposals have been developed with extensive input from our employees and their representatives. We look forward to reviewing and analyzing the comments on the proposed regulations and to the meet and confer process with our employee labor representatives. DOD is committed to the collaborative approach taken in the development of NSPS and will continue to encourage a dialogue as we proceed through the writing and development of the implementing issuances.

Thank you for the opportunity to address this important committee and to briefly describe the proposed National Security Personnel System.

Chairman WARNER. Thank you very much, Mr. Secretary.  
Mr. Blair.

**STATEMENT OF DAN G. BLAIR, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT**

Mr. BLAIR. Mr. Chairman and members of the committee, good morning. I appreciate the opportunity to be here this morning to highlight OPM's role in the development of the NSPS. I'm pleased to appear with Secretary England.

I'd like to recognize two members of the OPM team who are here today who have been critical players in the development of the proposed regulations. George Nesterchuck, senior advisor on the DOD, and Ron Sanders, associate director for strategic human resources policies.

I have a lengthy statement for the record detailing the process that led to the proposed regulations, and I'm happy to summarize. With the passage of the National Defense Authorization Act of 2004, Congress set in motion—

Chairman WARNER. I'm going to ask you to pull that mic and just raise your voice a bit. The acoustics in this room leave a little bit to be desired.

Mr. BLAIR. How is that, sir?

Chairman WARNER. The people in the back are quite anxious to hear you.

Mr. BLAIR. Thank you for that. With the passage of the National Defense Authorization Act of 2004, Congress set in motion a process to establish a new human resources system that would fit into the DOD's vital mission, while ensuring the preservation of the core principles of due process, merit, and fairness that make the American Civil Service unique.

The legislation forged a partnership between DOD and OPM which we believe has enabled us to produce a system that's flexible, modern, and responsive. OPM was assigned an important role in the development of NSPS, one which we took very seriously. We believe we have brought together wide expertise that was a critical addition to DOD mission-specific experience. We are very proud of the collaboration we have achieved.

Through this process we have sought to identify the critical balance between a modern flexible system and the core values of the Civil Service. I submit the proposed regulations strike that balance. We are very pleased with the cooperation from and the collaboration with the DOD, particularly Secretary England's office.

Since April 2004, the Department has made great strides in ensuring a transparent and constructive process for developing NSPS

in collaboration with employee representatives and other key stakeholders.

We have been working on this for over a year and we are in the process of reviewing the 60,000 comments received. We will officially begin the meet and confer process with the DOD unions on April 18 and have already had two premeetings to work out details, such as the meeting schedule.

We are looking forward to several weeks of productive meetings. Our partnership will continue as the regulations are finalized and implementation begins. DOD has developed a careful and systematic implementation plan supported by extensive training. We believe it's an excellent strategy.

As the transformation to a new system occurs, we will continue to focus on core values of the Civil Service, maintaining merit service principles, barring prohibited personnel practices, and continuing collaboration with employee unions. We will make certain that veterans' preference is never diminished.

Mr. Chairman, I'd like to highlight some key features of the proposed regulations. The proposed new pay system supported by a reworked classification system is designed to fundamentally change the way DOD employees are paid, and place far more emphasis on performance and the labor market in setting or adjusting rates of pay.

Staffing and reduction-in-force flexibilities are another critical component. New flexibilities in the proposed regulations will provide options to expedite hiring and improve workforce shaping, while preserving merit and veterans' preference.

Mr. Chairman, the proposed changes in the DOD will benefit the hard working men and women of the Department. The classification system and pay structure have been simplified to enhance career growth and provide higher earnings potential for qualified, talented, and motivated employees.

The performance system will better serve the security of our Nation because it better links individual performance and the Department's mission, goals, and objectives. I see the NSPS as an important step in modernizing the Civil Service. We realize the process is ongoing and we look forward to working with this committee as we move the proposed regulation to final and to implementation. I'd be happy to answer any of your questions.

[The prepared statement of Mr. Blair follows:]

PREPARED STATEMENT BY DAN G. BLAIR

#### INTRODUCTION

Mr. Chairman, it is my pleasure to appear before you today to discuss the proposed regulations implementing the National Security Personnel System (NSPS) at the Department of Defense (DOD) and the process of collaboration and cooperation that has brought us to this point. The regulations as proposed, will establish a new human resources (HR) management system that we believe is flexible, modern, and responsive thus fulfilling the vision of the President and Congress. The proposed regulations are the result of an intense collaborative process that has taken over a year, and we are still only halfway. There is much to do before the NSPS proposal can be finalized, beginning with the ongoing review of the extensive comments we have received. Beyond that will be the official meet and confer process with DOD unions. It has been a privilege for me and the team at OPM to work with the dedicated men and women of DOD, its employees and senior leadership in the development of this system. This monumental task has been challenging and rewarding.

We owe you our appreciation and respect for your efforts to make it possible and I appreciate your continued interest and support as we work through the development and implementation process.

Mr. Chairman, with passage of the National Defense Authorization Act of 2004 (Public Law 108-136), you and other Members of Congress granted the Secretary of Defense and the Director of OPM broad authority to establish a new human resources management system befitting the Department's vital mission while ensuring the preservation of the core principles of due process, merit, and fairness that make the American civil service unique. Striking the measured and delicate balance, between modernization on one hand and protecting core values on the other, is the essence of the transformation process that you established in the statute. We believe the regulations jointly proposed by DOD and OPM strike that balance in all of the key components of the system: performance-based pay, staffing flexibility, employee accountability with due process, and labor-management relations. In each case we sought to strike a careful balance between operational imperatives and employee interests, without compromising either mission or merit.

Mr. Chairman, in your invitation to this hearing you asked we address the process employed to gather employee input, the proposed regulations that have resulted from this process, and how OPM will continue to work with DOD to ensure employees have meaningful input in the remaining design and implementation process. I will address the important points regarding the process first and then address some key highlights of the proposed regulations.

Before that discussion, let me say that we are well aware of the intense interest in the proposed regulations. We very much appreciate the comments we have received from employees, employee representatives, and the advice we have received from Members of Congress. We would like to acknowledge the continuing interest from Senator Collins, the special concerns raised by Senator Levin, and the indepth commentary from Senator Akaka. We are reviewing their recommendations very carefully and they will be most helpful during this meet and confer process. While we believe that we have developed a balanced proposal that is faithful to the fundamental principles of the civil service, we do not view our proposals as necessarily the last word and look forward to addressing each of the issues raised by these Members.

#### COLLABORATION: OUTREACH AND EMPLOYEE INVOLVEMENT

The NSPS development process has been a broad based collaboration involving a multitude of DOD employees, managers, supervisors, labor union partners and key stakeholders. Over the course of the last year, DOD held over 50 Town Hall meetings in locations throughout the world. Over 100 Focus Groups were convened separately with employees (including bargaining unit representatives), managers, and HR professionals and practitioners. Briefings were initiated with a host of public interest groups, employee advocacy groups, and other stakeholders including veterans' service organizations. All along the way, OPM and DOD have worked as partners to fulfill the spirit and letter of the law as well as the trust Congress and the President have placed in us.

This extensive development process, which continues, is not a laboratory of mere compromise, but rather the critical place where perspectives are weighed and considered to ensure the best possible system is developed for NSPS. Through this process, we sought to identify the critical balance between a modern flexible system and the core values of the civil service.

OPM is no stranger to this unique process or the challenges of building trust, respect, and cooperation with managers, employees and their representatives. Our recent experience with the Department of Homeland Security (DHS), though different in many respects, has provided lessons and tools to improve our efforts with NSPS. The NSPS working groups were well served by the extensive research that had been compiled by similar teams who worked on the DHS personnel system some months earlier.

In following the legislative direction, we also have the benefit of DOD's extensive experience with alternative pay and personnel systems going back nearly 25 years. The employee evaluations and comments amassed through studies of these demonstration projects were part of the information base provided to our working groups. OPM has done an extensive analysis of the DOD demonstration projects and generated a comprehensive report. Copies of all of these compilations and reports were provided to DOD unions as an aid in our discussions and deliberations.

We also launched a special effort to engage the Department's 43 unions in meaningful discussions over key components of the NSPS. Beginning in April of last year until early December, we held 10 meetings with the unions. In an attempt to ad-



dress each other's priorities, OPM and DOD set the agenda for some of the meetings, while the unions set the agenda for others. We developed presentations of possible NSPS design options in order to better focus discussion in specific issue areas. The meeting format was plenary in nature, with 25 to 30 unions from their coalition participating in most of the sessions. We even held separate meetings with the smaller number of non-coalition unions. From this series of meetings, we received what we consider useful input, particularly as the unions shared experiences of past practices that had worked or failed in DOD and other government agencies.

Permit me to emphasize that this process is far from over. The formal "meet and confer" process established in the NSPS statute is scheduled to begin April 18. Two pre-meetings have already been held with the unions to work out details such as the meeting schedule and to accommodate other concerns raised by the unions such as the assurance of adequate access to documents. We are looking forward to several weeks of productive meetings and are very interested in receiving their views on the proposed regulations through this formal process. Later in my testimony, I will address several areas where I believe it is critically important to engage in an honest, meaningful and productive dialogue as we move forward to ensure the ultimate success of NSPS.

You also asked us to address the role of OPM throughout implementation of the NSPS, and the process that will be in place to coordinate and resolve policy differences between DOD and OPM.

This is an important issue, and I appreciate your raising it. In the interests of transparency, we believe a continuing process of coordination needs to be in place and we defined this process in the proposed regulations. Congress mandated a specific approach to ensuring a balanced process for developing NSPS. That process calls for the heads of DOD and OPM to jointly prescribe the system, after a period of collaboration with employee representatives and notification to Congress. As a key partner, we are very pleased with the cooperation from and collaboration with the Department of Defense. Since April 2004, the Department has made great strides in ensuring a transparent and constructive process for developing NSPS with employee input and collaboration with employee representatives. DOD and OPM together have championed an open, collaborative, and constructive process and environment for raising, discussing and resolving critical issues.

However, the effort does not end with jointly prescribing NSPS. OPM and DOD have agreed that OPM must have a role of close and continuing coordination—the regulations refer to this as "pre-decisional coordination"—as policies for implementing NSPS are developed. This process of coordination recognizes the Secretary's authority to direct the operations of DOD as well as the Director's institutional responsibility to oversee the Federal civil service system. Based on our experience thus far, the combination of OPM's Government-wide expertise and DOD's mission specific experience, the joint efforts have been very fruitful. Our agencies have reinforced each other's capabilities during NSPS development in a very positive and constructive manner. I have every expectation that our respective views during implementation will be equally complementary and constructive.

#### CONTINUED COLLABORATION

OPM is committed to work with DOD to ensure the continued involvement of employees in the development and implementation process. Together we addressed this specific issue in our proposed regulations and suggested a process that will ensure employee representatives are provided the opportunity to discuss their views with DOD officials. The proposal specifically identifies conceptual design and implementation issues as subject to discussion. Unions will be provided access to important information to make their participation productive, including review of draft recommendations or alternatives.

The proposed collaboration process draws on our experience over the past several months. While we value the participation of all DOD unions in the NSPS development process, it is at times impractical to convene a full plenary session of all 43 unions to discuss or review a particular initiative or proposal. So we propose to provide the Secretary the flexibility to convene smaller working groups of unions or to deal with review of written materials or solicit written comments for consideration, as appropriate. Some matters may involve development of concepts; others may consist of review of issuances before they are published. The best approach is to permit the Secretary to tailor the interaction and communications with DOD unions to the circumstances at hand.

We also propose to have the Secretary develop procedures to allow continuing collaboration with organizations that represent the interests of substantial numbers of nonbargaining unit employees. We believe this process will allow the Department

to maintain a broad outreach to its stakeholder community during the continuing evolution of the NSPS.

#### PAY, PERFORMANCE, AND ACCOUNTABILITY

Mr. Chairman, I would now like to address key highlights of the proposed regulations. As I mentioned earlier, these important components of the proposal are still being reviewed and discussed through the formal comments we have received and also through the upcoming “meet and confer” process.

The new pay system, proposed in the regulations, was designed to fundamentally change the way DOD employees are paid, to place far more emphasis on performance and the labor market in setting and adjusting rates of pay. Instead of an outmoded “one size fits all” pay system based on tenure, we have proposed a system that bases all individual pay adjustments on performance. No longer will employees who are rated as unacceptable performers receive annual across-the-board pay adjustments, as they do today. No longer will annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, adjustments will be strategically based on national and local labor market trends, recruiting and retention patterns, and other key employment factors. No longer will employees who merely meet time-in-grade requirements receive virtually automatic pay increases, as they do today. Instead, individual pay raises will be determined by an employee’s annual performance rating.

Unlike where our current system falls short, this proposed system is entirely consistent with the merit system principles that are so fundamental to our civil service. One of those principles states that Federal employees should be compensated “. . . with appropriate consideration of both national and local rates paid by employers . . . and appropriate incentives and recognition . . . for excellence in performance.” See 5 U.S.C. 2301(b)(3). The current system falls short because it has minimal ability to encourage and reward achievement and results. Over 75 percent of the increase in pay under the current system bears no relationship to individual achievement or competence. However, some have argued that by placing so much emphasis on performance, we risk “politicizing” DOD and its employees. Such “politicization” would constitute a prohibited personnel practice, something expressly forbidden by Congress in giving DOD and OPM authority to jointly prescribe the NSPS. Moreover, it would tear at the very fabric of our civil service system.

The merit system principles provide that Federal employees should be “. . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.” See 5 U.S.C. 2301(b)(8)(A). They are. Section 2302(b)(3) of title 5, United States Code, makes it a prohibited personnel practice to “coerce the political activity of any person . . . or take any action against any employee” for such activity. Those laws remain unchanged, intact and binding on DOD. The law forbids coercion for partisan political purposes in taking any personnel action with respect to covered positions, and it most certainly applies to making individual pay determinations. The proposed NSPS regulations did not dilute these prohibitions in any way. A close examination of the proposed regulations reveals that they include considerable protection against such practices—and no less than every other Federal employee enjoys today.

For example, if a DOD employee believes that decisions regarding his or her pay have been influenced by political considerations, he or she has a right to raise such allegations with the Office of Special Counsel (OSC), to have OSC investigate and where appropriate, prosecute, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in any way whatsoever. Moreover, supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by mathematical formula. Of the four variables in the formula—the employee’s annual performance rating; the “value” of that rating, expressed as a number of points or shares; the amount of money in the performance pay pool; and the distribution of ratings—only the annual rating is determined by an employee’s immediate supervisor, and it is subject to review and approval by the employee’s second-level manager. Once that rating is approved, an employee can still challenge it before it is final through an administrative process if he or she does not think it is fair.

Finally, the other factors governing performance pay are also shielded from any sort of manipulation. As far as the distribution of ratings is concerned, the Department has unequivocally stated it will not use any sort of quota or forced distribution.

Ultimately there is no better guarantor of compliance to laws and standards than transparency and access to information. The rules and procedures governing the translation of employee ratings into pay adjustments will be available to all DOD

employees, and will be part of the training everyone will receive. Unless employees readily understand how their pay adjustments are arrived at they will harbor suspicions and generate skepticism which would adversely impact the acceptance of pay for performance.

Of course, DOD managers will receive intensive training in the new system, a further safeguard against abuse. Many of them too will be covered by it, with their pay determined by, among other performance criteria, how effectively they administer this system. The same is true of their executives, now covered by the new Senior Executive Service pay-for-performance system—indeed, OPM regulations governing that system establish clear chain-of-command accountability in this regard. With these considerable protections in place, we believe ample safeguards will exist to prevent the pay of individual DOD employees from becoming “politicized” in a performance-based environment. To the contrary, we believe the American people expect that performance should influence the pay of public sector employees. That is exactly what the NSPS pay system is intended to do.

The institution of a modern performance culture is no easy task, but neither is it a partisan issue. Performance based accountability is widely recognized as the most effective way to manage employees whether in the private or public sector, in a large or small organization, whether by a Republican or Democrat administration. The proposed NSPS pay system incorporates the essential elements of good government: accountability, due process, transparency, and fairness. The dedicated and hard working employees of the Department of Defense will flourish in a system that finally sets clear expectations, and rewards employees accordingly, for accomplishing results. The best and brightest demand a performance culture that rewards excellence. DOD must have a modern pay system to be a competitive employer in the 21st century.

#### STAFFING FLEXIBILITIES

To fulfill its mission requirements, the Department needs a workforce suited to the complex tasks of a dynamic national security environment. The key to aligning and shaping a workforce lies in greater flexibility to attract, recruit, shape and retain high quality employees. The proposed regulations provide DOD with a set of flexible hiring tools to respond to continuing changes in mission and priorities. New flexibilities will provide options to target recruitment, expedite hiring, and adjust for the nature and duration of the work while preserving merit and veterans’ preference.

Under NSPS, employees will be either career, serving without time limit in competitive or excepted service positions, or they will be time-limited, serving for a specific period (term) or for an unspecified but limited duration (temporary). The Secretary, in coordination with the Director of OPM, will have the authority to prescribe the duration of time-limited appointments, advertising requirements, examining procedures, and appropriate uses of time-limited employees.

To expedite recruitment and hiring, DOD will continue to use direct-hire authority for severe shortage or critical hiring needs subject to the same criteria OPM currently uses to make these determinations. In addition, the Director and the Secretary may jointly establish new appointing authorities subject to public notice and comment.

The proposed rules provide recruitment flexibilities allowing DOD to target recruitment efforts consistent with merit system principles and complying fully with veterans’ preference requirements. The Department will provide public notice in filling positions and will accept applications from all qualified applicants; however, DOD may initially consider, at a minimum, only applicants in the local commuting area. If the minimum area of consideration does not provide sufficient qualified candidates, then DOD may expand consideration more broadly or nationally.

The proposed regulations would permit DOD to more effectively shape competitive areas during reductions in force (RIF) to better fit the circumstances driving the reduction and to minimize disruption to employees and their organizations. The competitive area may be based on one or more factors such as geographical location, lines of business, product lines, organizational units, and/or funding lines. Retention lists will be based on the traditional four retention factors of tenure, veterans’ preference, performance and seniority. Veterans’ preference remains untouched under NSPS RIF actions, but performance and seniority are reversed in priority. Within tenure and veterans’ status groupings, retention lists place high performers at the top and low performers at the bottom. Within performance categories, employees are grouped by seniority with longer years of service at the top of the category and lesser seniority at the bottom. The performance based retention inherent in this pro-

posal is entirely consistent with the greater emphasis on performance throughout the NSPS, including the pay system.

#### Accountability and Due Process

The Department of Defense is unique among Cabinet departments in both its size and organizational complexity. It also carries the awesome responsibility of protecting our national security—a vital mission that requires a high level of workplace accountability. Congress recognized this fact when it gave DOD and OPM the authority to waive those chapters of title 5, United States Code, which deal with adverse actions and appeals. However, in so doing, Congress also assured DOD employees that they would continue to be afforded the protections of due process. We believe the proposed NSPS regulations strike this balance. They assure far greater individual accountability, but without compromising the protections Congress guaranteed.

In this regard, DOD employees will still be guaranteed notice of a proposed adverse action. While the proposed regulations provide for a shorter, 15-day minimum notice period (compared to a 30-day notice under current law), this fundamental element of due process is preserved. Employees also have a right to be heard before a proposed adverse action is taken against them. This too is a fundamental element of due process, and the regulations also provide an employee a minimum of 10 days to respond to the charges specified in that notice—compared to 7 days today. In addition, the proposed regulations continue to guarantee an employee the right to appeal an adverse action to the Merit Systems Protection Board (MSPB). The proposed regulations also provide bargaining unit employees the option of contesting an adverse action through a negotiated grievance procedure all the way to a neutral private arbitrator, if their union invokes arbitration.

In adjudicating employee appeals, regardless of forum, the proposed NSPS regulations place a heavy burden on the agency to prove its case against an employee. Indeed, we propose to establish a higher burden of proof: a “preponderance of the evidence” standard for all adverse actions, whether based on misconduct or performance. While this is the standard that applies to conduct-based adverse actions under current law, it is greater than the “substantial evidence” standard presently required to sustain a performance-based action. Incidentally, in addition to being a consistent element of DOD’s new performance culture, this is an excellent example of where the collaborative process with employees and stakeholders made a substantial impact on the proposed regulations.

Finally, the proposed regulations authorize MSPB (as well as arbitrators) to mitigate penalties in adverse action cases, but only under limited circumstances. Thus, the proposed regulations provide that when the agency proves its case against an employee by a preponderance of the evidence, MSPB (or a private arbitrator) may reduce the penalty involved only when it is “so disproportionate to the basis for the action that it is wholly without justification.” Although it is admittedly tougher than the standards MSPB and private arbitrators apply to penalties in conduct cases today, it provides those adjudicators considerably more authority than they presently have in performance cases. Currently, the law (chapter 43 of title 5) literally precludes them from mitigating a penalty in a performance-based action taken under that chapter. Moreover, MSPB’s current mitigation standards basically allow it (and private arbitrators) to second-guess the reasonableness of the agency’s penalty in a misconduct case, without giving any special deference or consideration to an agency’s unique mission.

The President, Congress, and the American public all hold the Department accountable for accomplishing its national security mission. MSPB is not accountable for that mission, nor are private arbitrators. Given the extraordinary powers entrusted to the Department and its employees, and the potential consequences of poor performance or misconduct to that mission, DOD should be entitled to the benefit of any doubt in determining the most appropriate penalty for misconduct or poor performance on the job. There is a presumption that DOD officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department’s imposition of penalties. That is the intention of the new mitigation standard, which is balanced by the higher standard of proof that must first be met.

#### CRITICAL MISSIONS AND LABOR RELATIONS

As I stated before, the Department is a large and complex organization, with widely dispersed components and commands, and varied mission elements mixing both military and civilian workforces. With lives literally at stake, the Department’s commanders cannot afford mission failure. The chain of command depends on an ethos of accountability, and this goes to the heart of some of the most important

provisions of the proposed regulations: labor relations. Accountability must be matched by authority, and here, the current law governing relations between labor and management is out of balance. Its cumbersome requirements can impede the Department's ability to act, and that cannot be allowed to happen. The proposed regulations ensure that the Department can meet its mission, but in a way that still takes union and employee interests into account.

Critics of these proposed changes will argue that current law already allows the agency to do whatever it needs to do in an emergency. However, that statement, while true, explains why the current law is inadequate when it comes to national security matters. The Department needs the ability to move quickly on matters before they become an emergency. Current law simply does not allow DOD to take action quickly to prevent an emergency, to prepare or practice for dealing with an emergency, or to implement new technology to deter a potential threat. Rather, before taking any of those actions, the current law requires agencies to first negotiate with unions over the implementation, impact, procedures and arrangements. By the time an "emergency" has arisen, it is literally too late. OPM recognizes that this simply cannot continue.

Permit me to elaborate on one other related issue. The proposed National Security Labor Relations Board (NSLRB), will be an independent Board appointed by the Secretary to resolve collective bargaining disputes in the Department. The NSLRB is expressly designed to ensure that those who adjudicate labor disputes in the Department have expertise in its mission. Its members are every bit as independent as any of the many other Boards or Panels in the Department, or any agency's Administrative Law Judges (ALJs). Just as an agency's ALJs operate outside the chain of command, so too will NSLRB's members. Just as ALJ decisions are binding on the agency that employs them, so too will NSLRB's decisions be binding. However, the proposed regulations make it clear that the NSLRB's decisions will be subject to at least two levels of outside review through appeal by either party to the Federal Labor Relations Authority and the Federal courts of appeals. While I believe this approach is well balanced, we are open to exploring options to enhance this proposed process and this will very likely be an area of consideration in the "meet and confer" process.

#### CONCLUSION

If DOD is to be held accountable for national security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM the authority to waive and modify the laws governing staffing, classification, pay, performance management, labor relations, adverse actions, and appeals. In developing the proposed regulations, we believe that we have succeeded in striking a better balance—between union and employee interests on one hand and the Department's mission imperatives on the other. At the same time, all along the way, we made sure the core principles of the civil service were preserved.

Mr. Chairman, as the development and implementation process moves forward I ask for your continued support as we work to refine NSPS to ensure DOD has the flexible, modern, and responsive personnel system that the President and Congress expect. Thank you for the opportunity to appear before this committee. I would be pleased to respond to any questions you and members of the committee may have.

Chairman WARNER. Thank you. We will proceed now to a 6-minute round. The concept of Civil Service is well-embedded in our system of government. It goes back many years. Yet from time to time, there comes a juncture when a department or departments, as the case may be, because of the extraordinary mission that they are performing, and particularly as it relates to national security, I think that's the central mission of both the DOD and the DHS, that you must deviate from the practices, the balances between management and the employee that are elsewhere in the Federal Government.

I think that we should lay out for this record what were the elements of the expanding responsibilities of DOD in this most extraordinary chapter of our history, particularly as we face terrorism, that justify departing from some of the old systems, and now perhaps I think it merits some changing of the balance and the equities between the management and the employee.

Secretary ENGLAND. Senator, I believe that was the debate in Congress before the bill was passed.

Chairman WARNER. That is correct. I think we should revisit it here in this hearing. I'll address the same question to Mr. Blair because he looks over the entire Federal system.

Secretary ENGLAND. Senator, it is based on exactly what you said. It is about the mission of the DOD and the ability of the DOD to effectively carry out its mission.

That means that we have to be quicker, more agile, and more flexible because frankly that's the kind of threat we face today. We no longer have the long timelines. We have to be very responsive. We have to be able to recruit and retrain and retain the very best people in the workforce of the Federal Government. It's absolutely essential that we have the highest quality people we can, and that we are able to hire them quickly because when we cannot hire them quickly like in our current system, we lose them to other enterprises.

So we have to have better hiring practice. We have to be able to retain. We have to have the flexibility for people to be assigned jobs that need to be done more quickly. So today we have very narrow ranges, and if we want to assign people a different job sometimes in the same office it's many times very difficult.

So this is all about flexibility. It's also about pay for performance, which is a very mission-oriented approach. We want to pay people for the job they do and not strictly for their longevity. So mission first means that pay is for performance, we will have specific objectives to be accomplished, and they will flow literally from the President to the Secretary of Defense. In the case of the Department of the Navy, they will flow through me and every worker down in the deck plate, in Navy parlance, will know their objectives are tied to the objectives of this country.

So we will be able to flow objectives down, measure against those objectives and pay accordingly. So this is all a mission focused system. But let me point out, we maintain all the protections, all the fairness that's in the current Civil Service system. We are not doing away with any of those, as I said in my opening statement. So this is a more modern, flexible system for DOD to accomplish its mission.

Chairman WARNER. Thank you, and same basic question to you, Mr. Blair.

Mr. BLAIR. As you remember, Mr. Chairman, when NSPS was first considered, it was followed along on the heels of congressional action that enabled the DHS Secretary and the OPM Director to develop a new personnel system for the DHS.

This is part of a larger modernization process for the entire Civil Service. Beginning in the late 1990s, we've heard reports from a number of stakeholders on the crisis that was pending in the Civil Service. Apart from impending retirements that were taking place because of an aging workforce, we also saw that our systems were not able to adapt to a changing workplace and changing environment.

Our General Schedule system, which was up to date in 1949, was no longer responsive to the needs of the 21st century workforce. Most of the pay systems that we had for employees, while contem-

porary at the time that they were developed, were performance insensitive, and most were based on longevity and position rather than on performance, hence the need for changes in the Civil Service.

You saw that with the war on terror, and DOD's unique mission, that we needed to go forward and modernize in the way that they managed their workforce. That laid the foundation for the NSPS.

Chairman WARNER. Let's look at one specific, I'll address first to the Secretary and then let you respond. For nearly three decades the Merit System's Protection Board (MSPB) has served as an important protection for civilian employees against unfair, arbitrary treatment, in case of actions that adversely affect that employee.

The proposed regulation is a change in that role which appears to allow the DOD to override the MSPB administrative decisions. What are the criteria from which you justify the Department in overruling an MSPB decision, Mr. Secretary?

Secretary ENGLAND. I don't believe we overrule the MSPB's decisions. I believe when it goes to the MSPB, that is the last board. My understanding, I stand to be corrected here, but I believe the next recourse frankly is to the courts after that.

The MSPB, however, is different under the NSPS. The statute actually provides new standards for review for the MSPB and thus specifically any area concerning the mission of DOD. We did decide to keep the administrative judges in the system which was not required by statute.

So I believe, Senator, we are following the statute in this regard, and we are changing the standard for the MSPB, but that is in accordance with the statute and we have I believe mitigated that some by still having the administrative judges in place.

Chairman WARNER. All right.

Mr. Blair.

Mr. BLAIR. Mr. Chairman, the MSPB was consulted and a partner during this process in developing these proposed regulations. What we have done is to attempt to customize these procedures to the DOD. As Secretary England pointed out, MSPB administrative judges will be the initial hearing examiners to review the DOD's actions. The Department does have the ability to review an administrative judge's decision to reverse under specific circumstances. But this was done with an eye towards mission and an eye towards customizing these procedures to recognize the Department's important mission in maintaining the national security.

Chairman WARNER. I thank you. That same question will be put to the next panel to get their views.

Senator LEVIN.

Senator LEVIN. Thank you, Mr. Chairman. When we adopted the NSPS statute, we said that the right of collective bargaining would continue. However, we said in implementing and in adjusting the new system that the Department would be allowed to follow a certain specific approach with notice, with comment on the proposed rule or regulation, but also with an employee collaboration process. It was one or the other. This was very carefully worked out.

I believe Senator Collins deserves the lion's share of the credit because her work on this was tremendous. It took a lot of effort to

come to a conclusion as we did, which was a carefully crafted result in the NSPS.

Collective bargaining is protected. But in implementing the new system and in adjusting it, we could go through publication, comment, and an employee collaboration process.

Now, you come up with this regulation which just says management may not be involved in the collective bargaining and you list a whole bunch of things where you just can't be involved in collective bargaining. But you don't go through the process which we set forth, where we asked that of the NSPS. You bypassed that. So my direct question to you is, was that your intent, number one.

For instance, do you believe that overtime policy, shift rotation policy—

Secretary ENGLAND. Sir, I can't hear the question.

Senator LEVIN. Let me give it to you one at a time. Was that your intention?

Secretary ENGLAND. Senator, I'm not sure I understand your whole statement to answer it directly. I can tell you this. What we have tried to do is strike a balance in our collective bargaining. We still have a long list of collective bargaining, but we have also tried to strike a balance between accomplishing our mission and collective bargaining. So as something that is very mission specific involving the entire Department in terms of prompt response, we cannot put ourselves in the position of bargaining 1,500 times or so with every local union.

Senator LEVIN. We took care of that when we passed the law. You don't have to collectively bargain 1,500 times. You put in place a process as an alternative to that. We talked about notice and comment, publication, notice, comment and then an employee collaboration process. That's in the law.

Secretary ENGLAND. That continues, Senator.

Senator LEVIN. Let me ask you specifically, do you believe that you would continue to need to collectively bargain on overtime policy if this regulation goes into effect?

Secretary ENGLAND. I don't believe I can answer that question today because I don't believe that question has been answered yet, Senator. We are going into the meet and confer period now and we will decide during this process exactly what the particulars will be.

I can tell you the policy will be to not negotiate on those issues that are department-wide and affect the mission, accomplishing the mission of the Department. So where we have a specific mission need and we cannot accomplish that if we have a detailed bargaining that we would not do that. So I believe the policy is in place in broad regulations. The specifics is what will be worked out during this meet and confer period.

Senator LEVIN. I'm going to list five areas and if you can tell me if this proposed regulation becomes effective, whether or not there is a requirement that you collectively bargain in these five areas. Overtime policy?

Secretary ENGLAND. Senator, I don't know if I can answer. Overtime policy—there is a Federal law regarding overtime and overtime policy. In terms of people getting paid. I don't know how I can answer such a broad question. Obviously people continue to get



paid for overtime. People still schedule overtime, so I don't know what aspect of how to address that. I'm sorry, Senator. I don't—

Senator LEVIN. Shift rotation policy. Will there be a requirement that you continue to collectively bargain on shift rotation policy, if this draft regulation becomes permanent?

Secretary ENGLAND. Again, Senator, I believe that's something we will discuss during the meet and confer period. That's something that will be discussed. It's a specific question in terms of does that fit the mission need. That may very well vary depending on the circumstance, frankly. I don't believe there is an answer to each of these specific questions until we actually have an opportunity to develop the specific guidance and detail that will be in NSPS. We have not gotten to that point, Senator.

Senator LEVIN. The draft says that management is prohibited from bargaining over "the procedures that it will observe in exercising management rights to hire, assign, and compensate employees." Now, those matters were previously negotiable. They are subject to the law which we passed relative to employee collaboration. We have to know whether you're attempting to change that requirement or eliminate collective bargaining with this regulation that you've drafted.

Secretary ENGLAND. Senator, we are not eliminating collective bargaining. We are trying to streamline the system so we can do our mission and be able to do the broad across the Department tasks that we need to accomplish.

So we are not eliminating collective bargaining. By the way, also in that regulation, it says we will continue to have employee collaboration, so that does not go away. The fact is we have tried very hard to have dialogue with our employees, so that does not go away. That will continue throughout, and I hope as a continued basis, forever in that regard.

Senator LEVIN. Thank you, my time is up. Thank you, Mr. Chairman.

Chairman WARNER. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. Secretary England, I'm going to follow up on the questions just posed to you by Senator Levin and the chairman.

In my letter, I raised exactly the same concern that the Ranking Member has just brought up. As I read the regulations, they grant the Secretary of Defense sole, exclusive, and unreviewable discretion to promulgate issuances without employee involvement related to overtime pay and several other important issues. That does seem to me to be inconsistent with the intent and the letter of the law.

I want to go on to talk about two other issues. One is following up on the chairman's question about the role of the MSPB. The preamble to the proposed regulations states that the intent is to explicitly restrict the authority of the MSPB to modify penalties when there is an adverse action to situations where there is simply no justification for the penalty.

The regulations impose an extraordinarily high standard that the board cannot act unless the penalty is so disproportionate to the basis for the action as to be "wholly without justification." That's not what the law says and is not the standard that is set out very

clearly in the underlying law for the standard of review for the MSPB.

In fact, the underlying law says that the board may order corrective action if it determines that the decision was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law obtained without procedures required by law, having been followed, or unsupported by substantial evidence. That is a far different standard than “wholly without justification.”

How can the Department proceed to limit the role of the MSPB in a way that does not conform with the standard in the underlying law?

Secretary ENGLAND. Senator, we will obviously do it in accordance with the underlying law. If we have this wrong, then obviously we will go back and look at this. So we are looking at your letter, we owe you an answer. It is a valid input and I appreciate the input.

We will go work this, Senator, and we will get back with you on this. Again, we are still in the process of developing the system so it's a valid input. It's a good input. We accept it and we will get back with you on this issue. But we really appreciate the input, it's valid input and I appreciate it.

Senator COLLINS. I do hope that will be remedied. The second issue I want to raise is the National Security Labor Relations Board. Under the proposed regulations, the Secretary of Defense would have the exclusive authority to appoint the members of this board to hear disputes arising in labor management relations, so this is an important entity.

The Secretary would have one member selected from the list that is developed in consultation with the Director of OPM. The other members would just simply be appointed by the Secretary. Now, I want to contrast that with the approach taken by the DHS in its proposed rules.

The DHS would have a similar labor relations board to resolve disputes, but the regulations for the DHS personnel system require the Secretary of Homeland Security to consider candidates submitted by employee representatives, the labor organizations for two of the three board positions.

I think that makes sense. If you're going to have a board hear labor/management disputes, in order for it to have credibility, it needs to have representatives that understand the views of employees. It shouldn't just be stacked with management appointees. That's really a bad approach, because it heightens this feeling that it's management versus labor, which we are trying to get away from.

I think DHS took the right approach by asking in its regulations for involvement by the employee organizations. I would urge you to reconsider this as well and to follow the motto that DHS has put forth.

Secretary ENGLAND. We will, Senator. That's again valid input, one that we have already considered. So we will go—we will definitely take that advice seriously. It's not a management board, however, just let me correct the one thing. It is an independent board. It is independent and they have independence once they are on the board. However, who you name in the process to get there

is a valid issue. So again, I accept your input, Senator. It's a good suggestion and we will certainly discuss that as we work towards our final regulations.

Senator COLLINS. Thank you. I recognize that it is an independent board—but it's not going to be perceived as being an independent board if the Secretary is making all of the appointments with no input from the employees of DOD. I know from your considerable experience working with unions and employee representatives in the past, and you've had a lot of success, that you should be sensitive to the appearance here as well. I hope this will be changed in the final regulations and I thank the chairman.

Secretary ENGLAND. Senator, thanks for the constructive comments. They are appreciated. Thank you.

Senator COLLINS. Thank you.

Chairman WARNER. I thank you, Senator Collins, your contribution and your continuing participation are very important to this legislation.

Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman. I join in urging you, Mr. Secretary, to pay close attention to what Senator Collins and Senator Levin have brought out because they are very much so much involved in the drafting.

The Secretary claimed that he wanted the national level bargaining and speedier labor management dispute resolution. But I think the regulations that you put out restricts the collective bargaining well beyond the scope of what he claimed the intent was.

Now, in the legislation itself, on nonwaiverable provisions, it has chapter 71, nonwaiverable provisions. Chapter 71 of title 5 is collective bargaining and specifically in the law says that it cannot be waived. That is written in the law.

On the previous page, it outlines "to ensure that employees may organize bargaining collectively is provided for in this chapter and participate through labor organizations of their choosing in decisions which affect them subject of the provisions of this chapter, and any exclusion from coverage or limitation on negotiability established pursuant to law."

There is a whole body of case law in those provisions. Now, if you read what is outlined in the law and then look at your regulations, we find that under the management rights, you will find in section 9901.910, we find in section (b) that management is prohibited from bargaining over the exercise of any authority under this paragraph A in this section, procedures that it will observe and exercise the authority set forth in the paragraphs. That technically as we read it prohibits DOD managers from bargaining over the procedures, included in that is overtime, also working out overseas assignment and the rest.

I direct your attention as well to 9901.910(e)(2)(i), which says that "appropriate arrangements for employees adversely affected by the exercise of any authority under this section," and then it lists the various things that are not included such as overtime, routine work, routine assignments and specific duties, work on a regular overtime basis. It talks about the various kinds of areas that are currently protected in collective bargaining.

I just say that our counsel is looking at your regulations and also looking at the law, come to two entirely different conclusions. He is going to be challenged.

We hope in the spirit which you outlined earlier to the chairman and others that you be able—this is a far reach from what the Secretary had indicated to us as being the question, to being able to negotiate with a number of different unions and be able to make administrative decisions.

I would hope that—I don't know whether these have been brought to your attention by other legal authority or not, whether they are under review or not, but we would be glad to at least give you our view about exactly what the law says and how these regulations are inconsistent. That would be helpful whether Mr. Blair wants to make a comment on those particular provisions.

Mr. BLAIR. Thank you, Senator. We thought we were acting within the scope of our authority and continue to believe we are doing so. However, it is the subject of a lawsuit. A number of unions have filed suit against Secretary Rumsfeld and OPM over this very matter. I think these matters will be resolved in the courts as this lawsuit progresses.

Senator KENNEDY. If it says specifically that chapter 71 that deals with collective bargaining can't be waived, how do you go ahead and waive it in your regulations and get by with it? What is your quick answer to that?

Mr. BLAIR. I would say that we have not waived all the regulations, that we were modifying them. I'm being told by my lawyers I need to—

Senator KENNEDY. It doesn't say just some. It says the nonwaiverable provisions, it says chapter 71. It doesn't say some of chapter 71. The provisions, as we understood, were national collective bargaining and also that dealt with third party review, who is going to adjudicate the differences for the areas that most of us thought were the exceptions. But as I hear you respond to my question, saying we are going to take what in parts of chapter 71 we like and what parts we don't like.

Secretary ENGLAND. Senator, you offered to give us your input so that we can get back to you. It would be better if we did that. We would appreciate it if you just provide us your input, and then let us respond to you later rather than here today, we would appreciate that, sir.

Chairman WARNER. I think, Mr. Blair, you need more time to respond to the questioning. I want to give both of you such time as you require now. Then of course, the option to put something in the record.

Mr. BLAIR. I was responding.

Chairman WARNER. I beg your pardon?

Mr. BLAIR. I appreciate Senator Kennedy's strong advocacy on this behalf. At this point, the Justice Department and others are directing us to say as little as possible on this in case this debate is carried over to the courts. I respect the Senator's opinion on this, and I think this will be something that we work through the process.

Senator KENNEDY. Just regulations on the 9901.910 specifically prohibits where you've proposed management from negotiating over

the procedures to exercise rights to assign work, determine the personnel by which agency operations are conducted. So agency officials could move employees arbitrarily, or force a prolonged assignment anywhere in the world without regard to any hardship.

Of course, employees—see, my read on this is a very simple one. That is, if you make a management policy, you're going to be able to override anything that exists in there, because it is a management policy. Management policy's going to override overtime. It's going to override all of these. Because you're going to say, oh, it's a management policy question.

That's the only way you can explain it. It's almost exactly what it says at least in the regulations. That is a far reach from what the language is in, in this—in the legislation. But I thank you. My time is up. But I will look forward to the opportunity to have further exchange on that. Thank you, Mr. Chairman.

Chairman WARNER. Have you had an opportunity to reply to the Senator's questions?

Mr. BLAIR. Yes, sir. We have.

Chairman WARNER. Senator Talent.

Senator TALENT. Thank you, Mr. Chairman. One brief one. This is an issue, of course, in any properly run management system, but what have you thought about in terms of in order to ensure that the individual managers, the supervisors who do employee reviews and performance reviews, are acting fair and impartial manner. One of the objections that is raised in that kind of a system is that, well, they will take out vendettas, they will do personal things. I'm sure you anticipated that and you have something in mind. Maybe you can share with us what safeguards you have in place?

Mr. BLAIR. The performance reviews will be subject to at least two levels of review by the reviewing employee's supervisor, and also by the payroll manager who will be administering the pay increases.

But at the same time, prohibited personnel practices—which means cronyism and politics—cannot come into play. The Office of Special Counsel ensures that oversight and enforcement of personnel protections are all in place in all of this.

The bottom line is that we have attempted to craft a fair, credible, and transparent pay for performance system that will still be flexible to the needs of the DOD. I think it's important that employees understand that they have recourse when they feel that there is a decision regarding the performance that they don't agree with. We think that we have provided that. Again, this will be part of the meet and confer process. We think we have developed a fair and credible system.

Secretary ENGLAND. Senator, your question really gets to the heart of the whole pay for performance system, frankly, because you have to make sure that it's fair and equitable and not biased for any reason whatsoever.

So as Mr. Blair said, we will have two levels of review, and by the way, the managers and supervisors are on the same standard, that is, part of their measure of performance is to make sure that they have a fair and equitable system that they are exercising. So that will be part of their measurement criteria.

So there are two levels of review and we will during meet and confer be discussing that there are other avenues that we should have open to employees in terms of being able to be assured that they are getting fair and honest review.

But this is at the heart of the matter. All of our employees obviously have to be comfortable that this is a fair and equitable system. So we are very sensitive to this, and we will be working this for the coming weeks to get to the detailed regulations. Input in this area is appreciated because this is the heart of the system. We are working very hard to make sure we have a very credible system that our employees believe in.

Senator TALENT. I would congratulate you on the intention. This is the key, to have both the positive and negative in place. They know what they are graded on and what they are not supposed to be graded on. Both are very important so that when something happens, they know, well, because I had this standard that I knew I was supposed to meet and I either got there, in which case it's great, or I did not, in which case I understand why I'm not getting what I'm supposed to get.

Then by the way, if I suspect cronyism or something, I have an appeal. The other thing that's crucial for both you all and the employees is that these review levels need to be quick. What you don't want in a good personnel policy are disputes or concerns hanging around for months and months and months making people angry. You need to move through it pretty quickly, with enough time for everybody to have their point of view but then get it done, and get it out of the way.

Secretary ENGLAND. Absolutely. Senator, by the way, criteria are discussed with the employee in advance, literally written down and it has to be a measurable criteria. So there has to be a measure and a metric that the employee and the supervisor agree on in terms of performance. So this is not abstract.

The value of the system is that we will cascade down throughout the organization objectives so there will be written objectives with schedules, with criteria. It has to be measurable.

One of the strengths of this system is we now manage the entire enterprise with an objective, measurable system. So there will be a standard for every employee, different in terms of what is to be accomplished but there is a standard in terms of knowing what that is. This doesn't just happen at the end of the year. The objective is to set this early, to review this during the year, so there are not surprised at the end of the year. You have to have the training.

Senator TALENT. Also, they have to see the commitment from the top. It doesn't mean that you and the Secretary and the others have to be doing a lot. But they have to see that this is a priority for you and you have to see that reflected in the training dollars for the managers and the rewards given to the managers who do this well. This has to be a key thing. Because if they suspect a commitment isn't there at the top, it won't work. I used to practice labor and personnel law which is why I'm feeling so free to tell you how to do this.

Secretary ENGLAND. Thank you, sir.

Mr. BLAIR. A couple of points, Senator, on that, is that managers and supervisors will actually be held accountable for how well they perform their jobs and their pay will be reflected in that.

Second, you touched upon training. Training is going to be a key component in making this system successful. The DOD has a robust training program planned, based on the man-hours of training. Supervisors will get 18 hours of training, HR specialists will receive a minimum of 40 hours of training, employees will receive a minimum number of hours of training as well. I think that this shows a commitment on the part of the DOD to making sure that employees understand and recognize the working aspects of this new system in order to better understand it and not fear it.

Secretary ENGLAND. We will, Senator—we have 1 million training hours planned for 1.1. So when we go into 1.1 we will accomplish 1 million hours of training.

Senator TALENT. Thank you.

Chairman WARNER. Thank you very much, Senator.

Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman. I'm always delighted to see my good friend, Secretary England.

Secretary ENGLAND. Thank you, Senator.

Senator AKAKA. I want to thank you and Director Blair, for your testimony and I know the hard work you are all doing on NSPS.

My questions are to try to bring clarity to these many questions that have come to me. I am interested, Secretary England, in the costs associated with NSPS related to training, creating new labor/management and appeals boards. Also paying employees for their performance.

As you may know, DHS is requesting additional funding to help pay for the implementation of MAX HR, it's a new personnel system. Will the new pay system be budget neutral or do you anticipate increasing overall funding for civilian salaries in light of the performance element?

Secretary ENGLAND. Senator, it will be neutral, I believe that's required by statute. It will be neutral in terms of the pay itself, so we can distribute the money differently but the net is the same. Money obviously is appropriated by Congress and what's appropriated for increases in salaries, obviously that is the increment we will deal with. So it will be neutral.

We do have some costs. For example, we have \$38 million for our program office and for specific things that need to be accomplished. We also have within our own budgets training, because you know, all of our training is in our own in-house budgets.

I will comment here that training is a core competency of the DOD. One thing we do very well is to train our people and we will use our existing infrastructure for training to train our people in NSPS. But I can tell you, we are very sensitive to this whole area of training. I know you mentioned that in your opening statement. We are very sensitive.

We know that we don't send our people to the front lines without training. We also don't put people behind the lines without training, so that's a very sensitive area to us. We will not be proceeding unless all of our people are trained. This is not scheduled training. This is to make sure we are ready first before we proceed with the

next step. So I can assure you our people will be well trained before we enter into this system.

Senator AKAKA. At this point, will you know how much money will be dedicated for training, to training for performance management systems?

Secretary ENGLAND. I do not know if I can break it out that way because it shows up throughout our budget. We have asked each of our command elements to just include that in their budgets. So it shows up in a lot of different places in our budget, in our process. Like I had said, I believe the only identifiable line item is the \$38 million that's for our program office across the board and I believe putting the training together. But the actual training is part of our own in-house budgets.

Senator AKAKA. Secretary England, as I noted in my opening remarks, Secretary Rumsfeld testified in 2003 that NSPS would not end collective bargaining, yet the proposed regulations override collective bargaining agreements through Department directives and severely restricting matters subject to collective bargaining. In response to Senator Levin, you said that DOD would have collaboration. Would you please explain how you believe collective bargaining is retained?

Secretary ENGLAND. We still retain collective bargaining for items other than what I call broad mission items within the Department. So there is still a whole range of bargaining issues. We are not doing away with collective bargaining, but we are trying to balance the mission of DOD with our collective bargaining, so that's what we have put forward as the fundamental policy.

I believe as we go forward in this meet and confer, we will get down to the specifics of how that's implemented. I would comment, also, if I could, Senator, that I know a lot of our employees and everybody wants to know all the detail of the program, but we don't have the detail of this program yet, and will not have this detail end until the end of the meet and confer process.

You indicated there is some stress in the workplace. I understand that. There is stress everywhere until—personal stress, because it is a lot of change. But it will be stressful now because we don't know all the detail, and everybody would like to know the detail today. But we are still in the process of developing that detail within the broad proposed regulations. So again, a lot of the questions that are being asked, even some at this hearing, we don't have the answers for because we are not in that part of our development program yet.

Mr. BLAIR. If I could supplement Secretary England's statement, post implementation bargaining is retained in broad categories, as well as bargaining over certain procedures like personnel procedure, as an attempt to strike the right balance given the legislative framework in which these new regulations were developed.

Senator AKAKA. Thank you very much. Mr. Chairman, my time has expired.

Secretary ENGLAND. Thank you, Senator.

Chairman WARNER. Senator Clinton.

Senator CLINTON. Thank you, Mr. Chairman, and thank you, gentlemen. Of course, part of the dilemma and confusion that we are confronting here is that the devil is in the details. There are



many unanswered questions and it's very difficult for us to reach conclusions as to whether or not the proposed regulation complies with the law as intended and written.

I think the cautionary statements and questions by particularly Chairman Warner and Ranking Member Levin and Senator Collins since they were intimately involved in this process are a big yellow caution light, because it seems clear that there is some more questioning and answers to be obtained.

You just said that the new pay system will be budget neutral. Now, that raises a question for me because most of the demonstration projects that I'm familiar with, when it comes to pay for performance, have added additional money for salaries. So in effect, with a budget neutral system and an attempt to move toward pay for performance, there will definitely be increasing pay disparities.

So it's understandable that many of the key questions that employees are wondering about are not answered yet in this draft regulation. We don't have specific career groups and pay bands established. We don't have maximum and minimum pay levels. We don't have procedures for assigning pay to individual employees, rules for overtime, compensatory time, or other premium pay.

It is a very troubling change when there is so little guidance being given, and when there are these serious questions being raised about whether the regulation complies with the underlying law.

I think that what Congress attempted to do, as I understand the NSPS, was to give more authority within parameters to DOD. What we are concerned about is that those parameters which we thought were established in the law may not be determining what this proposal really is. That is why I think you're getting a lot of these inquiries.

I'm particularly concerned because all of these issues about pay which goes to the heart of employees' concerns—are being left to “implementing issuances” to be provided at some unspecified time in the future. I don't see how you can expect the DOD civilian employee workforce to have confidence in this new system when there is so much that is left unanswered. It's a great big trust-me theory.

I don't think that's in the best interests of either the management of DOD, the employees of DOD, or more importantly, the national security mission at DOD. We do not need to be breeding insecurity and confusion amongst the civilian employee workforce. So I would hope that both Secretary England and Mr. Blair, you would take these questions very seriously because there is a great deal of concern on this panel.

I want to ask a more general question because I am by no means an expert in all of the personnel questions. I'll leave that to my friend, Senator Akaka, and others. But Mr. Blair, in your testimony, you state that current law in labor relations is inadequate when it comes to national security matters because “DOD needs the ability to move quickly on matters before they become an emergency and current law simply doesn't allow you to do so.” I think that we understand the need for quick and flexible action. I think that the real underlying reason behind the law was to give you more flexibility for being able to move quickly if necessary.

But I think that a rational response to these problems might be to give you the authority, which is I thought what we were doing in the law, so that when national security is at stake, you can move but then you bargain over the impact of the implementation after the fact. However, that is not what your draft regulation does.

Instead, it exempts those issues, procedures, and arrangements from collective bargaining all together regardless of whether the situation is urgent or whether there is a national security need to proceed with action and without any bargaining, even after the fact.

So let me ask, if the reason for altering collective bargaining requirements is DOD's need to act quickly on urgent national security matters without bargaining first, why didn't you tailor your regulation to this narrow specific need instead of carving out these large categorical exemptions to collective bargaining requirements?

Mr. BLAIR. I think the intent was, Senator Clinton, to make sure the Department could move quickly. In doing so, we thought that we developed a good framework in carving out these exceptions.

Keep in mind, however, that these exceptions are in a proposed form, and will be going through a meet and confer process in the statutory period. Congress specified that when we did these proposed regulations we must allow 30-days notice and comment, and a minimum 30-day meet and confer period. Then with a 30-day statutory period for congressional review.

We are about to embark on the second stage. Comments such as yours will help us further frame the debate and further raise discussions as we move into this period. These regulations are not final. They are subject to change and comments like yours will help us as we further refine and draft these.

Senator CLINTON. I'm very glad to hear that and I know that other members of this committee are as well. Let me just perhaps put this into a broader context and I'll just speak on my own behalf, but I am increasingly concerned about the erosion of checks and balances in our Government.

I think that the genius of our founders as they created these checks and balances and we have done very well as a Nation for more than 200 years, so that if people got too powerful there was an independent judiciary, there was collective bargaining, there were ways of reining in unchecked power.

I just offer a cautionary note that I understand the urgency. I understand the great sense of mission at DOD, but human nature has not changed. As Lord Acton said: "Power tends to corrupt and absolute power corrupts absolutely." You're not just making changes for the short term, but ones that will last for some time.

I think one of the real benefits of our system is there are all these different voices and sometimes it's annoying and sometimes it slows you down and sometimes you wish you didn't have to deal with people who are saying, wait a minute, I'm a welder at this military facility that's not safe any more. We need to do something about it.

I would hope that not only on the specifics, but on the larger issue just be sure that we are not throwing the baby out with the bathwater here. That we are not changing a system that has served this country very, very well. Yes, if you're a manager you

always want free action. If you're an employee, you always want some kind of bargaining power. So creating that balance is what we should be doing and just based on a review of these regulations I'm afraid we are tilting the balance too far in that direction.

Secretary ENGLAND. Senator, first of all, what you just said, I will tell you I have already agreed with. I just had this conversation with Senator Levin a few moments ago. If you want something very clean and easy, dictatorships, that's their characteristic. Democracies are obviously messy and lots of voices and that's what is very important in our system and God bless America, it's what makes America, and so I recognize that.

I will tell you we are trying to strike a balance here. We have gotten 10,000 inputs from our employees. We have been with every organization, every service organization, veterans' organization. We have solicited everyone we know to provide input into the system.

Our objective is to make this fair, transparent, and as broad based as we can, to make sure we end up with an equitable system. It has to be equitable. This is our most critical resource in the DOD, I can assure you. Our whole objective is to make sure that this is more beneficial for our employees.

We are determined to make this a win for our employees and a win for national security. I'm convinced we can do that. We are all in this discussion to get there, but we are not at the end of this yet. We are about a third of the way through in terms of the detail of the system.

So I understand without the detail, that's where the devil is in the detail, we are working our way through this. There is opportunity for more dialogue or—a lot of opportunity. We are just entering that real dialogue period in terms of legislated dialogue with our unions, but there is opportunity again to interface with Congress on this subject.

So we do want a system that works appropriately. That given, we are going to change the system that we have today because it is not responsive to what we need to do. So we need to make sure that we do change those things that give us the flexibilities that we need, but we do not in any way eliminate anything of the protections and fairness that's in the current system.

So I can just give you my personal commitment, we will continue to work this. This is the way we've been working it for the last year. We will continue that way, and we will make it work out for all the employees. That is in the interest of DOD to make sure this works out well for our employees.

Chairman WARNER. Thank you very much, Senator. Thank you, witnesses. The chair, together with the ranking member, to try and complete this round of questions, so that we have—in a timely manner we can now entertain the very important remarks of our second panel. So at this time, I turn to my two colleagues on the left. I believe, Senator Reed, you might have a minute or two.

Senator REED. Thank you, Mr. Chairman, thank you, gentlemen. This morning's hearing has raised a host of issues. I'm most particularly concerned about the application of these rules to the national defense laboratories, to DOD labs, specifically and obviously the Naval Undersea Warfare Center in Newport. As I understand the legislation, new rules would not be applied to the laboratories

until October 1, 2008, yet I also understand there is a discussion of applying across DOD totally these rules in 2005. Can you clarify that, Secretary England?

Secretary ENGLAND. Yes. Senator Reed, the human resources part does not apply to the laboratories until 2008. Labor relations does apply across the board because you have to have a consistent labor relations process. But all the pay and all the things that are human resources part does not apply until October 2008. Then it applies, I believe, as long as we have a system better than a demonstration system so it's a decision to make that point. But that's the earliest point it does apply. So you're right, sir.

Senator REED. Thank you, Mr. Secretary. That's the legal issue and policy issue you have alluded to in your answer which is the system that they are using now. I can only speak from the knowledge of Newport, in which they are already using pay for performance incentives. They are looking at pay bands versus the GS system, where you have increased flexibility. So all of that has been worked out through what I think you assume will happen DOD-wide, the collaboration, discussion with both management and employees. I guess initially, my goal would be if it's not broken, don't fix it as you go forward. What is your inclination?

Secretary ENGLAND. These demonstration projects have been very useful to us, Senator. We've had years of experience, and that's the foundation, that's really what led up to the NSPS. So that whole experience base is very valuable as we go forward. You're right. Everything that we are bringing forward, that was our learning process. As indicated later, Mrs. Lacey who is now running this program office ran a number of those demonstrations, so that's been very helpful to us.

Senator REED. Have you conducted a formal assessment, Mr. Secretary, of those demonstration programs so that you can evaluate them and not only use them as a benchmark for what you are doing prospectively, but also within the Navy lab community? At the present moment, have you done that formal evaluation?

Secretary ENGLAND. We have. We had a formal evaluation of all the programs and a lot of informal evaluation. Mind you, that all happened frankly before I became involved with the system. But my understanding at that time was that we had—we went back through all those demonstration projects, had a lot of lessons learned out of all those projects as a foundation and an understanding of where we are today.

Senator REED. Could you share that information with us, Mr. Secretary? I think it would be very useful, since that's really the laboratory for this largest personnel—

Secretary ENGLAND. You're absolutely right, no, we can share that data.

Mr. BLAIR. Senator, I just want to say that DOD's evaluating, OPM has evaluated, I believe GAO has evaluated, and Congress has evaluated it several times. They've been the basis for many of the proposed changes, not just with NSPS, but also with DHS.

Senator REED. Thank you, Mr. Blair. Let me raise another issue in response to Senator Kennedy's questions about what he would argue are clear departures from the black letter of the law, you indicated that the Justice Department has advised you that you're

appropriately leading down the right path. Do you have a written legal opinion from the Department of Justice (DOJ)?

Mr. BLAIR. I'm sorry. I didn't mean to imply that we were going down the right path, but what I wanted to communicate to you was that, since this is the subject of a lawsuit, we are not at liberty to discuss the merits of the case or the specifics of the case. We believe we are going down the right path, however.

Senator REED. It seems from listening to Senator Kennedy's discussion that this is not one of these things where it's nuanced. It's pretty clear.

But I just make a general comment and I think it resonates with what Senator Clinton said also. We are seeing legal opinions coming out of the DOJ that seem to be deficient in real good legal analysis. This is particularly the case, I think, in the discussion—the issue of detainees. Secretary England, one of his other hats, if you're familiar with that. So deficient, in fact, that they have had to be repudiated. I would just say it would be nice if we could avoid lawsuits and it might be impossible. It might be avoided by just a more faithful reading of the legislation. Thank you.

Chairman WARNER. Senator Lieberman.

Senator LIEBERMAN. Mr. Chairman, I'm going to be very brief because I know you want to move on to the second panel. In fact, I'm going to make a statement, not ask a question unless the witnesses are moved to respond. That will be fine with me.

Because the one point I did want to focus on was along the lines that Senator Clinton asked, which is the extent to which you've issued on the proposed pay and performance regulations essentially a skeletal outline, maybe a little more than that, but as you acknowledge, more details to follow.

The concern about this is that we have a process. The process is aimed at encouraging maximum disclosure and feedback in a timely way. So to the extent that regulations are published in the Federal Register, for instance, and they are available not only to Members of Congress and employee groups, but to the general public if they want to comment one way or the other.

To the extent that the details are added later on which are quite important, that people may be deprived of that opportunity. So I just pick up on what you said and I really urge you to try the best you can to go out of your way as you develop more of the details of this process to make sure that both we in Congress are informed and have the opportunity to respond, and certainly that the employees themselves before there is a finality as the details are added have an opportunity to respond. So there is a sense of involvement and ultimately shared interest, mutuality, as we go forward. If you want to respond to that, that's great. If not, I will feel that I have spoken my peace.

Secretary ENGLAND. Senator, I do not disagree with you. My comment is this is a collaborative effort. I believe we have reached out to everyone we can possibly reach out to. We are open, accepting inputs. Our objective is to put the best system together we can for the DOD and for the Nation and for the employees.

So I don't disagree. That's what we are trying to do. There is always going to be disagreement, but again, welcome to America. That's our system, but at the end of the day, I believe we will end

up with a system that's fair and equitable and meets the mission of the DOD.

Senator LIEBERMAN. Thank you. Thanks, Mr. Chairman.

Chairman WARNER. Thank you very much. Senator Levin, you had one or two matters. We'll let the Senator just have the questions. Ordinarily, we would have time permitted to ask, and we ask you to provide your responses to the record in a timely way.

Senator LEVIN. Mr. Chairman, I do appreciate that. Secretary England, the new personnel regulations that have been issued by the DHS expressly allow for procedures to file grievances with independent arbitrators if the employee disagrees with the performance rating. The draft NSPS regulation does not contain a similar right for the DOD employees. Was that intentional, they do not have the same right provided for your DOD employees as DHS does?

Secretary ENGLAND. No. That's something we will still discuss in the meet and confer. Senator, it's vitally important that the employees be comfortable in their evaluations and we understand if there is an issue, there has to be some mechanism for review, in addition to supervisory review so that's an area that's still open for discussion, sir.

Senator LEVIN. Mr. Secretary, when we enacted the legislation, we understood that the Department wanted to give some greater weight to performance instead of just looking at seniority in its procedures.

As I read your draft regulations, however, it appears as though you want to give absolute priority to performance over seniority in every case, and then base your assessment of performance exclusively on the employee's most recent rating.

If that meaning is correct, I would hope that you would reconsider that because it seems to me that an employee, for instance, who has received a single outstanding rating in the most recent year should not necessarily be preferred over somebody whose ratings have been terrific over the prior years, but at a somewhat lesser rating in that most recent year.

Secretary ENGLAND. We agree.

Senator LEVIN. Finally, for Mr. Blair, the statute provided that when it came to establishing and adjusting the new system, it would be through regulations prescribed jointly—key word there jointly—by the Secretary of Defense and the Director of Office of Personnel Management.

A year ago, when the DOD sought to exclude OPM from the development of a new system, Senator Collins and I and others insisted that the law be followed, that the Department comply with the statutory requirement that OPM be involved.

I understand you were a full partner in the drafting of these regulations and that's how it should be. However, there are certain provisions in the draft regulation which provide that critical elements of the new system, such as the basic parameters for hiring, promoting, assigning employees, setting and adjusting pay, evaluating performance, and appeal of performance ratings, will be established in future implementing issuances, which would be put out solely by the Secretary of Defense.

In a few cases, the draft regulation provides for significant decisions about the new system, such as the establishment of mandatory removal offenses, to be made at the “sole, exclusive, and unreviewable discretion of the Secretary of Defense.” That’s not what our law provided for.

I’m wondering whether or not you are going to take a look at this, and if you agree that our law provided that as a matter of fact, regulations be prescribed jointly, both in the establishment and the adjustment of the system, that you will make that OPM position clear.

Mr. BLAIR. With your help, Senator, we have had an outstanding partnership between DOD and OPM, especially since Secretary Rumsfeld took part in the process. We anticipate that continuing.

Senator LEVIN. Does that mean that you will insist that the legislative language that’s in the law be complied with?

Mr. BLAIR. We will look at that legislative language. However, I anticipate OPM’s role will continue to be as it was. We will be involved intricately with the Department throughout every step in implementing this. As far as internal regulations go, I think we will take a look at that, to see to what extent OPM should be involved, but we certainly appreciate your interest in OPM’s prerogatives in this.

Senator LEVIN. I want to just add my thanks to both of you. You are both open to suggestions, and that’s the way it must be. We have a long way to go and I was happy to hear from you, Mr. Secretary, that you think we are just perhaps a third of the way down that road. It’s a long road. It’s an important road for all of us and your participation in it is essential. I want to thank you for your openness.

Secretary ENGLAND. Thank you. By the way, Senator, just a comment, even when we start this 1.1, that continues. We don’t actually pay anyone under this spiral system until January 2007. So there is a period here where we will continue to learn and adjust as we go through the system, to make sure we have it right before any employees’ salary is actually on the line. So there is—we have time. We are not going to rush. We are going to make sure we do it right.

Chairman WARNER. That’s very reassuring, Mr. Secretary. You made a good presentation and response to our questions by both of you. As I said, we’ll assume that further questions will be provided for the record. As long as this is viewed as an ongoing process, with all voices and perspectives carefully considered, I hope that you can assure us that that’s going to be the case, both of you.

Secretary ENGLAND. I can assure you that’s the case, Senator, that’s what we will continue.

Chairman WARNER. Drawing on my own experience with the Department, I was privileged to be there over 5 years and I had a magnificent working relationship with my civilian side and my military side.

For those of us who had that wonderful opportunity to serve in that great Department, we know it’s a team between that uniformed individual and that civilian. They’re often side by side, and it has to remain that teamwork. So it’s unlike any other Department, our agency, in the Federal Government. So you have a spe-

cial challenge. I thank both of you. I recognize that both of you have to depart but I would hope the representatives of your offices can remain to hear the important testimony of our next panel.

Secretary ENGLAND. Yes. I'm going to stay myself, sir.

Chairman WARNER. I think that's a great courtesy.

Mr. BLAIR. Thank you very much, Senator.

Chairman WARNER. Thank you very much, Mr. Blair. So we will now have a second panel: Derek Stewart, Director of Military and DOD Civilian Personnel Issues, GAO; John Gage, National President, American Federation of Government Employees; and Hannah Sistare, Director, Human Resources Management Consortium, Executive Director, National Commission on the Public Service Implementation Initiative, the National Academy of Public Administration. We welcome you, and is there an order of presentation that you would prefer?

Mr. STEWART. Yes, sir. We were talking with your staff, I think it was agreed that GAO—

Chairman WARNER. I simply want to say to my old friend, Mr. Gage, I have worked with him many years. He came into the office to see me. I said, now, look here, what can you do to just focus on those main things that you feel that require the attention of the Senate at this time. I judge from your opening statement, you have done exactly that. I thank you, Mr. Gage.

All right, Mr. Stewart, lead off. Your statements in their entirety, the written statements will be included as part of the record and if you will give us your presentation at this time.

**STATEMENT OF DEREK B. STEWART, DIRECTOR, MILITARY AND DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. STEWART. Thank you, Mr. Chairman. I am pleased to be here today and this is a very important topic that affects not only the 700,000 Defense civilian employees at the DOD, but it has critical implications for the rest of the Government, future government-wide reform. So it is important that the proposed NSPS regulations be properly defined and effectively implemented. So we are pleased to be here to participate in this hearing.

I am going to truncate my statement somewhat because a number of issues I had planned to touch on have been discussed.

Chairman WARNER. I thank you for that. I wonder if you could make it 5 minutes apiece. Be assured that the Senators and the staff of the committee are going to review these statements in their entirety.

Mr. STEWART. Yes, sir. I can probably be less than 5 minutes.

Chairman WARNER. No. I want to you take the full 5 minutes.

Mr. STEWART. Yes, sir. Regarding labor relations, our preliminary work shows that the proposed regulations would reduce the number of bargaining areas, including those procedures affecting how employees are deployed, assigned work, and use of technology. But the regulations clearly say that.

In addition, the National Security Labor Relations Board that was discussed earlier would largely replace the Federal Labor Relations Authority.



Senator Collins brought up the fact that the Secretary of Defense has authority to appoint the members of that board. Another point that I would like to make is not only does the Secretary of Defense have the authority to appoint the members of that board, he also has the authority to remove the members of the board. That's a different model from that of several other agencies.

On adverse actions and employee appeals, the proposed regulations shorten the adverse action process by removing the requirement to allow the employees an opportunity to improve their performance. So there is no longer a requirement, if these proposed regulations become final, that would afford employees an improvement opportunity as currently exists.

Also, while the regulations generally preserve the employees' right to appeal adverse actions to the MSPB, the regulations also would permit DOD to modify or reverse the initial MSPB made decisions based on internal DOD review.

The regulations do not spell out what this internal review process is, who will conduct the process, or how it will be conducted. These are very important details. An internal agency review process of this importance should be spelled out in the regulations.

DOD proposed regulations also would permit DOD to identify specific offenses for which removal is mandatory. The regulations state that employees will be made aware of the mandatory removal offenses. We believe that the process for determining and communicating these offenses should be explicit and transparent and involve a number of stakeholders, including Congress and employee representatives.

Lastly, Mr. Chairman, on pay and performance management, there are a number of issues there: how DOD will align individual performance with organizational goals, how performance expectations will be communicated to employees, and the criteria DOD will use to promote employees from one band to another. There are a plethora of issues that really need to be worked out in detail.

The one thing that I heard from DOD on the first panel that's a little different to what the GAO has been advocating is that there should be predecisional, internal safeguards so that the agency is prospectively looking at what is happening with performance ratings, and what is happening with promotions. It should not be a retrospective look where the employees complain and then there are all of these processes to take care of employees' complaints.

At the GAO, we have predecisional, internal safeguards where the Office of Opportunity and Inclusiveness is looking at Equal Employment Opportunity (EEO) issues, discrimination issues, and promotion and pay issues before the employee receives his or her rating. So these predecisional safeguards—and I didn't hear the DOD official mention those—are a concern for us. Mr. Chairman, this completes my prepared remarks and I'd be happy to entertain any questions you may have.

Chairman WARNER. Thank you. I think it would be important for the record if you just give us a short description of your career and association with the Federal workforce.

Mr. STEWART. I have been an employee of the GAO since 1974, so I guess that's about 31 years now. I received my degree from Morgan State University, I also attended the National Defense

University for a year and received a Master's degree there in National Military Strategy.

I have had a host of positions within the GAO looking at a number of issues to include a 3-year assignment in what we call operations, where I actually had to deal with EEO complaints and helping to develop personnel policies.

Unfortunately, I was actually part of the major reduction in force in the GAO from 1995 to 1997 where we had reduced the number of employees by 3,000 people, that was probably the most difficult thing that I have done in my life. So I have a little bit of experience with personnel issues and as an agency, we're very concerned about DOD's new personnel system because it has government-wide impact. Thank you, Mr. Chairman.

[The prepared statement of Mr. Stewart follows:]

PREPARED STATEMENT BY DEREK B. STEWART

Chairman Warner and members of the committee: I appreciate the opportunity to be here today to provide our preliminary observations on the Department of Defense's (DOD) proposed National Security Personnel System (NSPS) regulations, which the Secretary of Defense and the acting Director of the Office of Personnel Management (OPM) jointly released for public comment on February 14, 2005.<sup>1</sup> The National Defense Authorization Act for Fiscal Year 2004<sup>2</sup> gave DOD significant authorities to redesign the rules, regulations, and processes that govern the way that defense civilian employees are hired, compensated, promoted, and disciplined. The proposed regulations, which according to DOD will ultimately affect more than 700,000 defense civilian employees, are especially critical because of their implications for governmentwide reform.

NSPS represents a huge undertaking for DOD, given its massive size and geographically and culturally diverse workforce. In addition, DOD's new human resources management system will have far-reaching implications for the management of the department and for civil service reform across the Federal Government. NSPS could, if designed and implemented properly, serve as a model for governmentwide transformation in human capital management. However, if not properly designed and implemented, NSPS could impede progress toward a more performance- and results-based system for the Federal Government as a whole.

We raised several issues regarding DOD's civilian workforce in a recently released report on the fiscal challenges the Federal Government faces in the 21st century, including whether DOD is pursuing the design and implementation of NSPS in a manner that maximizes the chance of success.<sup>3</sup> In recent testimony on DOD's business transformation efforts, we indicated that DOD is challenged in its efforts to effect fundamental business management reform, such as NSPS, and indicated that our ongoing work continues to raise questions about DOD's chances of success.<sup>4</sup> There is general recognition that the government needs a framework to guide the kind of large-scale human capital reform occurring at DOD and the Department of Homeland Security (DHS), a framework that Congress and the administration can implement to enhance performance, ensure accountability, and position the Nation for the future. Implementing large-scale change management initiatives is a complex endeavor, and failure to address a wide variety of personnel and cultural issues, in particular, has been at the heart of unsuccessful organizational transformations. Strategic human capital management, which we continue to designate as a high-risk area governmentwide,<sup>5</sup> can help agencies marshal, manage, and maintain the workforce they need to accomplish their missions.

<sup>1</sup> National Security Personnel System, 70 Fed. Reg. 7552 (Feb. 14, 2005).

<sup>2</sup> Pub. L. No. 108-136 § 1101 (Nov. 24, 2003).

<sup>3</sup> GAO, 21st Century Challenges: Reexamining the Base of the Federal Government, GAO-05-325SP (Washington, DC: February 2005).

<sup>4</sup> GAO, Department of Defense: Further Actions Are Needed to Effectively Address Business Management Problems and Overcome Key Business Transformation Challenges, GAO-05-140T (Washington, DC: Nov. 18, 2004).

<sup>5</sup> GAO, High-Risk Series: An Update, GAO-05-207 (Washington, DC: January 2005).

## SUMMARY

Let me begin by summarizing three positive features and several areas of concern. The first positive feature is that the proposed regulations provide for many elements of a flexible and contemporary human resources management system—such as pay bands and pay for performance. The second positive feature is that the proposed regulations will allow DOD to rightsize its workforce when implementing reduction-in-force (RIF) orders. For example, DOD will be able to give greater priority to employee performance in RIF decisions and take more factors into consideration when defining the areas in which employees will compete for retention. The third positive feature is that DOD has pledged to engage in a continuing collaboration with employee representatives. On March 16, 2005, the 30-day public comment period on the proposed regulations ended. On March 28, 2005, DOD and OPM notified Congress that they are about to begin the meet and confer process with employee representatives who provided comments on the proposed regulations. (It should be noted that 10 Federal labor unions have filed suit alleging that DOD failed to abide by the statutory requirements to include employee representatives in the development of DOD's new labor relations system authorized as part of NSPS.)

However, in addition to the litigation referenced above, our initial work indicates several areas of concern. First, DOD has considerable work ahead to define the details of the implementation of its system, including such issues as adequate safeguards to help ensure fairness and guard against abuse. Second, in setting performance expectations, the proposed regulations would allow the use of core competencies to communicate to employees what is expected of them on the job, but the proposed regulations do not require the use of these core competencies. Requiring such use can help provide consistency and clarity in performance management. Third, the proposed regulations do not identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS.

GAO believes that DOD would benefit if it develops a comprehensive communications strategy that provides for ongoing, meaningful two-way communication that creates shared expectations among employees, employee representatives, managers, customers, and stakeholders. In addition, DOD should complete an implementation plan for NSPS, including an information technology plan and a training plan. Until DOD completes such a plan, the full extent of the resources needed to implement NSPS may not be well understood.

DOD's proposed regulations are intended to provide a broad outline of its new human resources management system. While they are not, nor were they intended to be, a detailed presentation of how the new system will be implemented, the details of the proposed regulations do matter. Although we continue to review the DOD's extensive regulations, today I will provide some preliminary observations on selected provisions of the proposed regulations.

PRELIMINARY OBSERVATIONS ON PROPOSED REGULATIONS FOR DOD'S NATIONAL  
SECURITY PERSONNEL SYSTEM

DOD and OPM's proposed NSPS regulations would establish a new human resources management system within DOD that governs basic pay, staffing, classification, performance management, labor relations, adverse actions, and employee appeals. We believe that many of the basic principles underlying the proposed DOD regulations are generally consistent with proven approaches to strategic human capital management. Today, I will provide our preliminary observations on selected elements of the proposed regulations in the areas of pay and performance management, staffing and employment, workforce shaping, adverse actions and appeals, and labor-management relations.

*Pay and Performance Management*

In January 2004, we released a report on pay for performance for selected OPM personnel demonstration projects that shows the variety of approaches taken in these projects to design and implement pay-for-performance systems.<sup>6</sup> Many of these personnel demonstration projects were conducted within DOD. The experiences of these demonstration projects provide insights into how some organizations in the Federal Government are implementing pay for performance, and thus can guide DOD as it develops and implements its own approach. These demonstration projects illustrate that understanding how to link pay to performance is very much a work in progress in the Federal Government and that additional work is needed to ensure

<sup>6</sup> GAO, Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects, GAO-04-83 (Washington, DC: Jan. 23, 2004).

that performance management systems are tools to help agencies manage on a day-to-day basis and achieve external results.

When DOD first proposed its new civilian personnel reform, we strongly supported the need to expand pay for performance in the Federal Government.<sup>7</sup> Establishing a clear link between individual pay and performance is essential for maximizing performance and ensuring the accountability of the Federal Government to the American people. As we have stated before, how pay for performance is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful.<sup>8</sup> DOD's proposed regulations reflect a growing understanding that the Federal Government needs to fundamentally rethink its current approach to pay and better link pay to individual and organizational performance. To this end, the DOD proposal takes another valuable step toward a modern performance management system as well as a market-based, results-oriented compensation system. My comments on specific provisions of pay and performance management follow.

#### *Aligning Individual Performance to Organizational Goals*

Under the proposed regulations, the DOD performance management system would, among other things, align individual performance expectations with the department's overall mission and strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. However, the proposed regulations do not detail how to achieve such an alignment, which is a vital issue that will need to be addressed as DOD's efforts in designing and implementing a new personnel system move forward. Our work on public sector performance management efforts in the United States and abroad has underscored the importance of aligning daily operations and activities with organizational results.<sup>9</sup> We have found that organizations often struggle with clearly understanding how what they do on a day-to-day basis contributes to overall organizational results, while high-performing organizations demonstrate their understanding of how the products and services they deliver contribute to results by aligning the performance expectations of top leadership with the organization's goals and then cascading those expectations to lower levels.

A performance management system is critical to successful organizational transformation. As an organization undergoing transformation, DOD can use its proposed performance management system as a vital tool for aligning the organization with desired results and creating a "line of sight" to show how team, unit, and individual performance can contribute to overall organizational results. To help Federal agencies transform their culture to be more results oriented, customer focused, and collaborative in nature, we have reported on how a performance management system that defines responsibility and ensures accountability for change can be key to a successful merger and transformation.<sup>10</sup>

#### *Establishing Pay Bands*

Under the proposed regulations, DOD would create pay bands for most of its civilian workforce that would replace the 15-grade General Schedule (GS) system now in place for most civil service employees. Specifically, DOD (in coordination with OPM) would establish broad occupational career groups by grouping occupations and positions that are similar in type of work, mission, developmental or career paths, and competencies. Within career groups, DOD would establish pay bands. The proposed regulations do not provide details on the number of career groups or the number of pay bands per career group. The regulations also do not provide details on the criteria that DOD will use to promote individuals from one band to another. These important issues will need to be addressed as DOD moves forward. Pay banding and movement to broader occupational career groups can both facilitate DOD's movement to a pay-for-performance system and help DOD better define career groups, which in turn can improve the hiring process. In our prior work, we have reported that the current GS system, as defined in the Classification Act of 1949,<sup>11</sup> is a key barrier to comprehensive human capital reform and that the creation of broader occupational job clusters and pay bands would aid other agencies

<sup>7</sup> GAO, Defense Transformation: Preliminary Observations on DOD's Proposed Civilian Personnel Reforms, GAO-03-717T (Washington, DC: Apr. 29, 2003).

<sup>8</sup> GAO, Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations, GAO-04-479T (Washington, DC: Feb. 25, 2004).

<sup>9</sup> GAO-04-479T.

<sup>10</sup> GAO, Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations, GAO-03-669 (Washington, DC: July 2, 2003).

<sup>11</sup> 5 U.S.C. §§ 5101-5115.

as they seek to modernize their personnel systems.<sup>12</sup> The standards and process of the current classification system are key problems in Federal hiring efforts because they are outdated and thus not applicable to today's occupations and work.

Under the proposed regulations, DOD could not reduce employees' basic rates of pay when converting to pay bands. In addition, the proposed regulations would allow DOD to establish a "control point" within a band that limits increases in the rate of basic pay and may require certain criteria to be met for increases above the control point.<sup>13</sup> The use of control points to manage employees' progression through the bands can help to ensure that their performance coincides with their salaries and that only the highest performers move into the upper half of the pay band, thereby controlling salary costs. The OPM personnel demonstration projects at China Lake and the Naval Sea Systems Command Warfare Center's Dahlgren Division have incorporated checkpoints or "speed bumps" in their pay bands. For example, when an employee's salary at China Lake reaches the midpoint of the pay band, the employee must receive a performance rating that is equivalent to exceeding expectations before he or she can receive additional salary increases.

#### *Setting and Communicating Employee Performance Expectations*

Under the proposed regulations, DOD's performance management system would promote individual accountability by setting performance expectations and communicating them to employees, holding employees responsible for accomplishing them, and making supervisors and managers responsible for effectively managing the performance of employees under their supervision. While supervisors are supposed to involve employees, insofar as practicable, in setting performance expectations, the final decisions regarding performance expectations are within the sole and exclusive discretion of management.

Under the proposed regulations, performance expectations may take several different forms. These include, among others, goals or objectives that set general or specific performance targets at the individual, team, or organizational level; a particular work assignment, including characteristics such as quality, quantity, accuracy, or timeliness; core competencies that an employee is expected to demonstrate on the job; or the contributions that an employee is expected to make. As DOD's human resources management system design efforts move forward, DOD will need to define, in more detail than is currently provided, how performance expectations will be set, including the degree to which DOD components, managers, and supervisors will have flexibility in setting those expectations.

The range of expectations that DOD would consider in setting individual employee performance expectations are generally consistent with those used by high-performing organizations. DOD appropriately recognizes that given the vast diversity of work done in the department, managers and employees need flexibility in crafting specific expectations. However, the experiences of high-performing organizations suggest that DOD should require the use of core competencies as a central feature of its performance management effort.<sup>14</sup> Based on our review of other agency efforts and our own experience at GAO, we have found that core competencies can help reinforce employee behaviors and actions that support the department's mission, goals, and values, and can provide a consistent message to employees about how they are expected to achieve results. By including such competencies as change management, cultural sensitivity, teamwork and collaboration, and information sharing, DOD would create a shared responsibility for organizational success and help ensure accountability for the transformation process.

#### *Making Meaningful Distinctions in Employee Performance*

High-performing organizations seek to create pay, incentive, and reward systems that clearly link employee knowledge, skills, and contributions to organizational results. These organizations make meaningful distinctions between acceptable and outstanding performance of individuals and appropriately reward those who perform at the highest level. DOD's proposed regulations state that supervisors and managers would be held accountable for making meaningful distinctions among employees based on performance and contribution, fostering and rewarding excellent performance, and addressing poor performance.

<sup>12</sup>GAO, Human Capital: Opportunities to Improve Executive Agencies' Hiring Processes, GAO-03-450 (Washington, DC: May 30, 2003).

<sup>13</sup>Because movement through the pay band is based on performance, employees could progress through the pay band more quickly than they could receive similar increases under the GS system. One method of preventing employees from eventually migrating to the top of the pay band, and thus increasing salary costs, is to establish control points within each band.

<sup>14</sup>GAO, Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success, GAO-03-488 (Washington, DC: Mar. 14, 2003).

Under the proposed regulations, DOD is expected to have at least three rating levels for evaluating employee performance. We urge DOD to consider using at least four summary rating levels to allow for greater performance-rating and pay differentiation. This approach is in the spirit of the new governmentwide performance-based pay system for the Senior Executive Service (SES), which requires at least four rating levels to provide a clear and direct link between SES performance and pay as well as to make meaningful distinctions based on relative performance. Cascading this approach to other levels of employees can help DOD recognize and reward employee contributions and achieve the highest levels of individual performance.<sup>15</sup>

*Providing Adequate Safeguards to Ensure Fairness and Guard Against Abuse*

Although DOD's proposed regulations provide for some safeguards to ensure fairness and guard against abuse, additional safeguards should be developed. For example, as required by the authorizing legislation, the proposed regulations indicate that DOD's performance management system must comply with merit system principles and avoid prohibited personnel practices; provide a means for employee involvement in the design and implementation of the system; and, overall, be fair, credible, and transparent. However, the proposed regulations do not offer details on how DOD would: (1) promote consistency and provide general oversight of the performance management system to help ensure it is administered in a fair, credible, and transparent manner; and (2) incorporate predecisional internal safeguards that are implemented to help achieve consistency and equity, and ensure nondiscrimination and nonpoliticization of the performance management process. Last month, during testimony, we stated that additional flexibility should have adequate safeguards, including a reasonable degree of transparency with regard to the results of key decisions, whether it be pay, promotions, or other types of actions, while protecting personal privacy. We also suggested that there should be both informal and formal appeal mechanisms within and outside of the organization if individuals feel that there has been abuse or a violation of the policies, procedures, or protected rights of the individual. Internal mechanisms could include independent human capital office and office of opportunity and inclusiveness reviews that provide reasonable assurances that there would be consistency and nondiscrimination. Furthermore, it is of critical importance that the external appeal process be independent, efficient, effective, and credible.

In April 2003, when commenting on DOD civilian personnel reforms, we testified that Congress should consider establishing statutory standards that an agency must have in place before it can implement a more performance-based pay program, and we developed an initial list of possible safeguards to help ensure that pay-for-performance systems in the government are fair, effective, and credible.<sup>16</sup> For example, we have noted that agencies need to ensure reasonable transparency and provide appropriate accountability mechanisms in connection with the results of the performance management process.<sup>17</sup> This can be done by publishing the overall results of performance management and individual pay decisions while protecting individual confidentiality and by reporting periodically on internal assessments and employee survey results relating to the performance management system. DOD needs to commit itself to publishing the results of performance management decisions. By publishing the results in a manner that protects individual confidentiality, DOD could provide employees with the information they need to better understand their performance and the performance management system. Several of the demonstration projects have been publishing information about performance appraisal and pay decisions, such as the average performance rating, the average pay increase, and the average award for the organization and for each individual unit, on internal Web sites for use by employees. As DOD's human resources management system design efforts move forward, DOD will need to define, in more detail than is currently provided, how it plans to review such matters as the establishment and implementation of the performance appraisal system—and, subsequently, performance rating decisions, pay determinations, and promotion actions—before these actions are finalized, to ensure they are merit based.

*Staffing and Employment*

The authorizing legislation allows DOD to implement additional hiring flexibilities that would allow it to: (1) determine that there is a severe shortage of candidates or a critical hiring need; and (2) use direct-hire procedures for these posi-

<sup>15</sup> GAO, Human Capital: Observations on Final DHS Human Capital Regulations, GAO-05-391T (Washington, DC: Mar. 2, 2005).

<sup>16</sup> GAO-03-717T.

<sup>17</sup> GAO-04-479T.

tions. Under current law, OPM, rather than the agency, determines whether there is a severe shortage of candidates or a critical hiring need. DOD's authorizing legislation permits that DOD merely document the basis for the severe shortage or critical hiring need and then notify OPM of these direct-hire determinations. Direct-hire authority allows an agency to appoint people to positions without adherence to certain competitive examination requirements (such as applying veterans' preference or numerically rating and ranking candidates based on their experience, training, and education) when there is a severe shortage of qualified candidates or a critical hiring need. In the section containing DOD's proposed hiring flexibilities, the proposed regulations state that the department will adhere to veterans' preference principles as well as comply with merit principles and the title 5 provision dealing with prohibited personnel practices.

While we strongly endorse providing agencies with additional tools and flexibilities to attract and retain needed talent, additional analysis may be needed to ensure that any new hiring authorities are consistent with a focus on the protection of employee rights, on merit principles—and on results. Hiring flexibilities alone will not enable Federal agencies to bring on board the personnel that are needed to accomplish their missions. Agencies must first conduct gap analyses of the critical skills and competencies needed in their workforces now and in the future, or they may not be able to effectively design strategies to hire, develop, and retain the best possible workforces.

#### *Workforce Shaping*

The proposed regulations would allow DOD to reduce, realign, and reorganize the department's workforce through revised RIF procedures. For example, employees would be placed on a retention list in the following order: tenure group (i.e., permanent or temporary appointment), veterans' preference eligibility (disabled veterans will be given additional priority), level of performance, and length of service; under current regulations, length of service is considered ahead of performance. We have previously testified, prior to the enactment of NSPS, in support of revised RIF procedures that would require much greater consideration of an employee's performance.<sup>18</sup> Although we support greater consideration of an employee's performance in RIF procedures, agencies must have modern, effective, and credible performance management systems in place to properly implement such authorities.

An agency's approach to workforce shaping should be oriented toward strategically reducing, realigning, and reorganizing the makeup of its workforce to ensure the orderly transfer of institutional knowledge and achieve mission results. DOD's proposed regulations include some changes that would allow the department to rightsize the workforce more carefully through greater precision in defining competitive areas, and by reducing the disruption associated with RIF orders as their impact ripples through an organization. For example, under the current regulations, the minimum RIF competitive area is broadly defined as an organization under separate administration in a local commuting area. Under the proposed regulations, DOD would be able to establish a minimum RIF competitive area on a more targeted basis, using one or more of the following factors: geographical location, line of business, product line, organizational unit, and funding line. The proposed regulations also provide DOD with the flexibility to develop additional competitive groupings on the basis of career group, occupational series or specialty, and pay band. At present, DOD can use competitive groups based on employees: (1) in the excepted and competitive service, (2) under different excepted service appointment authorities, (3) with different work schedules,<sup>19</sup> (4) pay schedule, or (5) trainee status. These reforms could help DOD approach rightsizing more carefully; however, as I have stated, agencies first need to identify the critical skills and competencies needed in their workforce if they are to effectively implement their new human capital flexibilities.

#### *Adverse Actions and Appeals*

As with DHS's final regulations,<sup>20</sup> DOD's proposed regulations are intended to streamline the rules and procedures for taking adverse actions, while ensuring that employees receive due process and fair treatment. The proposed regulations establish a single process for both performance-based and conduct-based actions, and

<sup>18</sup> GAO-03-717T; GAO, Defense Transformation: DOD's Proposed Civilian Personnel System and Government-wide Human Capital Reform, GAO-03-741T (Washington, DC: May 1, 2003); and Human Capital: Building on DOD's Reform Effort to Foster Governmentwide Improvements, GAO-03-851T (Washington, DC: June 4, 2003).

<sup>19</sup> For example, employees who work full time, part time, seasonally, or intermittently.

<sup>20</sup> Department of Homeland Security Human Resources Management System, 70 Fed. Reg. 5272 (Feb. 1, 2005).

shorten the adverse action process by removing the requirement for a performance improvement plan. In addition, the proposed regulations streamline the appeals process at the Merit Systems Protection Board (MSPB) by shortening the time for filing and processing appeals.

Similar to DHS, DOD's proposed regulations also adopt a higher standard of proof for adverse actions in DOD, requiring the department to meet a "preponderance of the evidence" standard in place of the current "substantial evidence" standard. For performance issues, while this higher standard of evidence means that DOD would face a greater burden of proof than most agencies to pursue these actions, DOD managers are not required to provide employees with performance improvement periods, as is the case for other Federal employees. For conduct issues, DOD would face the same burden of proof as most agencies.

DOD's proposed regulations generally preserve the employee's basic right to appeal decisions to an independent body—the MSPB. However, in contrast to DHS's final regulations, DOD's proposed regulations permit an internal DOD review of the initial decisions issued by MSPB adjudicating officials. Under this internal review, DOD can modify or reverse an initial decision or remand the matter back to the adjudicating official for further consideration. Unlike other criteria for review of initial decisions, DOD can modify or reverse an initial MSPB adjudicating official's decision where the department determines that the decision has a direct and substantial adverse impact on the department's national security mission.<sup>21</sup> According to DOD, the department needs the authority to review initial MSPB decisions and correct such decisions as appropriate, to ensure that the MSPB interprets NSPS and the proposed regulations in a way that recognizes the critical mission of the department and to ensure that MSPB gives proper deference to such interpretation. However, the proposed regulations do not offer additional details on the department's internal review process, such as how the review will be conducted and who will conduct them. An internal agency review process this important should be addressed in the regulations rather than in an implementing directive to ensure adequate transparency and employee confidence in the process.

Similar to DHS's final regulations, DOD's proposed regulations would shorten the notification period before an adverse action can become effective and provide an accelerated MSPB adjudication process. In addition, MSPB would no longer be able to modify a penalty for an adverse action that is imposed on an employee by DOD unless such penalty is so disproportionate to the basis of the action as to be "wholly without justification." In other words, MSPB has less latitude to modify agency-imposed penalties than under current practice. The DOD proposed regulations also stipulate that MSPB could no longer require that parties enter into settlement discussions, although either party may propose doing so. DOD, like DHS, expressed concerns that settlement should be a completely voluntary decision made by parties on their own initiative. However, settling cases has been an important tool in the past at MSPB, and promotion of settlement at this stage should be encouraged.

Similar to DHS's final regulations, DOD's proposed regulations would permit the Secretary of Defense to identify specific offenses for which removal is mandatory. Employees alleged to have committed these offenses may receive a written notice only after the Secretary of Defense's review and approval. These employees will have the same right to a review by an MSPB adjudicating official as is provided to other employees against whom appealable adverse actions are taken. DOD's proposed regulations only indicate that its employees will be made aware of the mandatory removal offenses. In contrast, the final DHS regulations explicitly provide for publishing a list of the mandatory removal offenses in the Federal Register. We believe that the process for determining and communicating which types of offenses require mandatory removal should be explicit and transparent and involve relevant congressional stakeholders, employees, and employee representatives. Moreover, we suggest that DOD exercise caution when identifying specific removable offenses and the specific punishment. When developing these proposed regulations, DOD should learn from the experience of the Internal Revenue Service's (IRS) implementation of its mandatory removal provisions.<sup>22</sup> (IRS employees feared that they would be falsely accused by taxpayers and investigated, and had little confidence that they would not be disciplined for making an honest mistake.) We reported that IRS officials believed this provision had a negative impact on employee morale and effectiveness and had a "chilling" effect on IRS frontline enforcement employees, who

<sup>21</sup> Any final DOD decision under this review process may be further appealed to the full MSPB. Further, the Secretary of Defense or an employee adversely affected by a final order or decision of the full MSPB may seek judicial review.

<sup>22</sup> Section 1203 of the IRS Restructuring and Reform Act of 1998 outlines conditions for firing of IRS employees for any of 10 actions of misconduct.



were afraid to take certain appropriate enforcement actions.<sup>23</sup> Careful drafting of each removable offense is critical to ensure that the provision does not have unintended consequences.

DOD's proposed regulations also would encourage the use of alternative dispute resolution and provide that this approach be subject to collective bargaining to the extent permitted by the proposed labor relations regulations. To resolve disputes in a more efficient, timely, and less adversarial manner, Federal agencies have been expanding their human capital programs to include alternative dispute resolution approaches. These approaches include mediation, dispute resolution boards, and ombudsmen. Ombudsmen typically are used to provide an informal alternative to addressing conflicts. We previously reported on common approaches used in ombudsmen offices, including (1) broad responsibility and authority to address almost any workplace issue, (2) their ability to bring systemic issues to management's attention, and (3) the manner in which they work with other agency offices in providing assistance to employees.<sup>24</sup>

The DOD proposed regulations recognize the right of employees to organize and bargain collectively.<sup>25</sup> However, similar to DHS's final regulations, the proposed regulations would reduce the scope of bargaining by (1) removing the requirement to bargain on matters traditionally referred to as "impact and implementation" (which include the processes used to deploy personnel, assign work, and use technology) and (2) narrowing the scope of issues subject to collective bargaining. A National Security Labor Relations Board would be created that would largely replace the Federal Labor Relations Authority. The proposed board would have at least three members selected by the Secretary of Defense, with one member selected from a list developed in consultation with the Director of OPM. The proposed board would be similar to the internal Homeland Security Labor Relations Board established by the DHS final regulations, except that the Secretary of Defense would not be required to consult with the employee representatives in selecting its members. The proposed board would be responsible for resolving matters related to negotiation disputes, to include the scope of bargaining and the obligation to bargain in good faith, resolving impasses, and questions regarding national consultation rights.

Under the proposed regulations, the Secretary of Defense is authorized to appoint and remove individuals who serve on the board. Similar to DHS's final regulations establishing the Homeland Security Labor Relations Board, DOD's proposed regulations provide for board member qualification requirements, which emphasize integrity and impartiality. DOD's proposed regulations, however, do not provide an avenue for any employee representative input into the appointment of board members. DHS regulations do so by requiring that for the appointment of two board members, the Secretary of Homeland Security must consider candidates submitted by labor organizations. Employee perception concerning the independence of this board is critical to the resolution of issues raised over labor relations policies and disputes.

Our previous work on individual agencies' human capital systems has not directly addressed the scope of specific issues that should or should not be subject to collective bargaining and negotiations. At a forum we co-hosted in April 2004 exploring the concept of a governmentwide framework for human capital reform, participants generally agreed that the ability to organize, bargain collectively, and participate in labor organizations is an important principle to be retained in any framework for reform. It also was suggested at the forum that unions must be both willing and able to actively collaborate and coordinate with management if unions are to be effective representatives of their members and real participants in any human capital reform.

#### DOD FACES MULTIPLE IMPLEMENTATION CHALLENGES

Once DOD issues its final regulations for its human resources management system, the department will face multiple implementation challenges that include establishing an overall communications strategy, providing adequate resources for the implementation of the new system, involving employees in designing the system, and evaluating DOD's new human resources management system after it has been implemented. For information on related human capital issues that could potentially affect the implementation of NSPS, see the "Highlights" pages from previous GAO products on DOD civilian personnel issues in appendix I.

<sup>23</sup> GAO, Tax Administration: IRS and TIGTA Should Evaluate Their Processes of Employee Misconduct Under Section 1203, GAO-03-394 (Washington, DC: Feb. 14, 2003).

<sup>24</sup> GAO-01-479T.

Labor-Management Relations

<sup>25</sup> Under current law, the rights of employees to bargain may be suspended for reasons of national security. See title 5 U.S.C. §§ 7103(b) and 7112(b)(6).

*Establishing an Overall Communications Strategy*

A significant challenge for DOD is to ensure an effective and ongoing two-way communications strategy, given its size, geographically and culturally diverse audiences, and different command structures across DOD organizations. We have reported that a communications strategy that creates shared expectations about, and reports related progress on, the implementation of the new system is a key practice of a change management initiative.<sup>26</sup> This communications strategy must involve a number of key players, including the Secretary of Defense, and a variety of communication means and mediums. DOD acknowledges that a comprehensive outreach and communications strategy is essential for designing and implementing its new human resources management system, but the proposed regulations do not identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS.

Because the NSPS design process and proposed regulations have received considerable attention,<sup>27</sup> we believe one of the most relevant implementation steps is for DOD to enhance two-way communication between employees, employee representatives, and management. Communication is not only about “pushing the message out,” but also using two-way communication to build effective internal and external partnerships that are vital to the success of any organization. By providing employees with opportunities to communicate concerns and experiences about any change management initiative, management allows employees to feel that their input is acknowledged and important. As it makes plans for implementing NSPS, DOD should facilitate a two-way honest exchange with, and allow for feedback from, employees and other stakeholders. Once it receives this feedback, management needs to consider and use this solicited employee feedback to make any appropriate changes to its implementation. In addition, management needs to close the loop by providing employees with information on why key recommendations were not adopted.

*Providing Adequate Resources for Implementing the New System*

Experience has shown that additional resources are necessary to ensure sufficient planning, implementation, training, and evaluation for human capital reform. According to DOD, the implementation of NSPS will result in costs for, among other things, developing and delivering training, modifying automated human resources information systems, and starting up and sustaining the National Security Labor Relations Board. We have found that, based on the data provided by selected OPM personnel demonstration projects, the major cost drivers in implementing pay-for-performance systems are the direct costs associated with salaries and training.

DOD estimates that the overall cost associated with implementing NSPS will be approximately \$158 million through fiscal year 2008. According to DOD, it has not completed an implementation plan for NSPS, including an information technology plan and a training plan; thus, the full extent of the resources needed to implement NSPS may not be well understood at this time. According to OPM, the increased costs of implementing alternative personnel systems should be acknowledged and budgeted up front.<sup>28</sup> Certain costs, such as those for initial training on the new system, are onetime in nature and should not be built into the base of DOD’s budget. Other costs, such as employees’ salaries, are recurring and thus would be built into the base of DOD’s budget for future years. Therefore, funding for NSPS will warrant close scrutiny by Congress as DOD’s implementation plan evolves.

*Involving Employees and Other Stakeholders in Implementing the System*

The proposed regulations do not identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS. However, DOD’s proposed regulations do provide for continuing collaboration with employee representatives. According to DOD, almost two-thirds of its 700,000 civilian employees are represented by 41 different labor unions, including over 1,500 separate bargaining units. In contrast, according to OPM, just under one-third of DHS’s 110,000 Federal employees are represented by 16 different labor unions, including 75 separate bargaining units. Similar to DHS’s final regulations, DOD’s proposed regulations about the collaboration process, among other things, would permit the Secretary of Defense to determine (1) the number of employee representatives allowed

<sup>26</sup> GAO-03-669.

<sup>27</sup> DOD’s efforts to date to involve labor unions have not been without controversy. Ten Federal labor unions have filed suit alleging that DOD failed to abide by the statutory requirements to include employee representatives in the development of DOD’s new labor relations system authorized as part of NSPS. See *American Federation of Government Employees, AFL-CIO et al v. Rumsfeld et al*, No. 1:05cv00367 (D.D.C. filed Feb. 23, 2005).

<sup>28</sup> OPM, *Demonstration Projects and Alternative Personnel Systems: HR Flexibilities and Lessons Learned* (Washington, DC: September 2001).

to engage in the collaboration process, and (2) the extent to which employee representatives are given an opportunity to discuss their views with and submit written comments to DOD officials. In addition, DOD's proposed regulations indicate that nothing in the continuing collaboration process will affect the right of the Secretary of Defense to determine the content of implementing guidance and to make this guidance effective at any time. DOD's proposed regulations also will give designated employee representatives an opportunity to be briefed and to comment on the design and results of the new system's implementation. DHS's final regulations, however, provide for more extensive involvement of employee representatives. For example, DHS's final regulations provide for the involvement of employee representatives in identifying the scope, objectives, and methodology to be used in evaluating the new DHS system.

The active involvement of employees and employee representatives will be critical to the success of NSPS. We have reported that the involvement of employees and employee representatives both directly and indirectly is crucial to the success of new initiatives, including implementing a pay-for-performance system. High-performing organizations have found that actively involving employees and stakeholders, such as unions or other employee associations, when developing results-oriented performance management systems helps improve employees' confidence and belief in the fairness of the system and increases their understanding and ownership of organizational goals and objectives. This involvement must be early, active, and continuing if employees are to gain a sense of understanding and ownership of the changes that are being made. The 30-day public comment period on the proposed regulations ended March 16, 2005. DOD and OPM notified Congress that they are preparing to begin the meet and confer process with employee representatives who provided comments on the proposed regulations. Last month, during testimony, we stated that DOD is at the beginning of a long road, and the meet and confer process has to be meaningful and is critically important because there are many details of the proposed regulations that have not been defined. These details do matter, and how they are defined can have a direct bearing on whether or not the ultimate new human resources management system is both reasoned and reasonable.

#### *Evaluating DOD's New Human Resources Management System*

Evaluating the impact of NSPS will be an ongoing challenge for DOD. This is especially important because DOD's proposed regulations would give managers more authority and responsibility for managing the new human resources management system. High-performing organizations continually review and revise their human capital management systems based on data-driven lessons learned and changing needs in the work environment. Collecting and analyzing data will be the fundamental building block for measuring the effectiveness of these approaches in support of the mission and goals of the department.

DOD's proposed regulations indicate that DOD will establish procedures for evaluating the regulations and their implementation. We believe that DOD should consider conducting evaluations that are broadly modeled on the evaluation requirements of the OPM demonstration projects. Under the demonstration project authority, agencies must evaluate and periodically report on results, implementation of the demonstration project, cost and benefits, impacts on veterans and other equal employment opportunity groups, adherence to merit system principles, and the extent to which the lessons from the project can be applied governmentwide. A set of balanced measures addressing a range of results, and customer, employee, and external partner issues may also prove beneficial. An evaluation such as this would facilitate congressional oversight; allow for any midcourse corrections; assist DOD in benchmarking its progress with other efforts; and provide for documenting best practices and sharing lessons learned with employees, stakeholders, other Federal agencies, and the public.

We have work underway to assess DOD's efforts to design its new human resources management system, including further details on some of the significant challenges, and we expect to issue a report on the results of our work sometime this summer.

#### CONCLUDING OBSERVATIONS

As we testified previously on the DOD and DHS civilian personnel reforms, an agency should have to demonstrate that it has a modern, effective, credible, and, as appropriate, validated performance management system in place with adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to ensure fairness and prevent politicization of the system and abuse of employees before any related flexibilities are operationalized. DOD's proposed NSPS regulations take a valuable step toward a modern performance management system

as well as a more market-based, results-oriented compensation system. DOD's proposed performance management system is intended to align individual performance and pay with the department's critical mission requirements; hold employees responsible for accomplishing performance expectations; and provide meaningful distinctions in performance. However, the experiences of high-performing organizations suggest that DOD should require core competencies in its performance management system. The core competencies can serve to reinforce employee behaviors and actions that support the DOD mission, goals, and values and to set expectations for individuals' roles in DOD's transformation, creating a shared responsibility for organizational success and ensuring accountability for change.

DOD's overall effort to design and implement a strategic human resources management system—along with the similar effort of DHS—can be particularly instructive for future human capital management, reorganization, and transformation efforts in other Federal agencies.

Mr. Chairman and members of the committee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

#### CONTACTS AND ACKNOWLEDGMENTS

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Chairman WARNER. I thank you very much for your appearance today and for your representation of your constituency, as we say in Congress. Mr. Gage, a little bit about your distinguished career in Federal service?

Mr. GAGE. I was a Social Security worker and disability examiner, in fact, I came into the government as a disability examiner. I got involved in the union as the editor of a newspaper and became local president for 22 years of American Federation of Government Employees' (AFGE) largest local, and did a lot of contracts, especially on the performance management side in VA and Social Security. Even one with Mrs. Lacey in the Navy, so—and I was elected national president of AFGE just about 2 years ago.

Chairman WARNER. Thank you. We are happy to receive your comments at this time.

#### STATEMENT OF JOHN GAGE, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. GAGE. Mr. Chairman, thank you very much for having me here. I'm representing AFGE and also the United DOD Workers Coalition, which represents 36 unions covering 600,000 workers in the Department. Again, I'm very happy to be able to share our views on the NSPS.

We have numerous concerns with the draft regulations which are cited in both my written statement as well as the comments submitted by the coalition. But, the following concerns are those that we see as most serious needing correction.

First, DOD has proposed radically reducing the scope of collective bargaining. The proposal effectively eliminates collective bargaining by greatly expanding the management rights clause as compared to current law, thereby rendering what was previously negotiable issues to be off the table. Such issues include procedures and arrangements for overtime, shift rotation, flexible and com-

pressed work schedules, safety and health programs, and deployment away from regular worksite.

In addition, DOD will be able to unilaterally override provisions of collective bargaining simply by sending out issuances. The scope of bargaining must be restored so that meaningful employee participation can continue to exist in DOD. The proposed regulations do not follow the authorizing legal mandates to safeguard collective bargaining rights to DOD employees.

When the legislation authorizing NSPS was under consideration, Secretary Rumsfeld assured Congress that his only intent with regard to collective bargaining was to establish national level bargaining over most issues. We can live with that. We can make that work. But we can't live with the NSPS draft because it reduces the scope of bargaining to virtually nothing, far beyond any real or imagined national security concerns.

Second, the board that hears labor management disputes arising from NSPS must be independent of DOD management. In the proposed regulations, DOD would establish an internal board made up entirely of individuals appointed by the Secretary. This board would be paid by and beholden to DOD management. It would have no attendance or credibility with the workforce.

Secretary Rumsfeld again promised Congress prior to the enactment of the law authorizing NSPS that any board established to hear labor management disputes would be independent. First, there is no good reason for DOD to have an internal labor board which duplicates the functions and costs of the Federal Labor Relations Authority. But if it must exist, then as a safeguard, it must be entirely separate and distinct from DOD management.

Third, and one that particularly rankles me, is the standard for mitigation in discipline and adverse action cases under NSPS in the proposed regulation is virtually impossible to meet, and effectively removes the possibility of litigation.

DOD must change the standard from wholly without justification to the court-imposed standard established years ago of unreasonable. Employees must have meaningful due process, and we have to restore a reasonable standard for mitigation to safeguard against arbitrary and capricious actions. DOD must really just stop the game of playing with these long-established legally recognized standards.

Further in contrast to current law, the proposed NSPS adds additional bureaucratic delay by declaring that adverse action and arbitrations will no longer be final and binding. Instead, they will have to be reviewed by the MSPB, thereby reducing the authority of arbitrators. This is entirely unsupportable and contrary to congressional intent. It again weakens an important safeguard for employees.

Fourth, under the NSPS, employee performance appraisals will be a crucial determinant to salary, salary adjustment and job security. Yet under the proposed regulations, there is no requirement for management to present written standards against which performance will be measured.

In addition, employees are denied the right available to all current Federal employees, including those under the new Homeland Security personnel system, to use a negotiated grievance and arbi-

tration system to present evidence to an impartial body as a critical safeguard for fairness and transparency.

Fifth, the proposed pay regulations open the door for a general reduction in salaries for DOD as a whole compared to rates they would have been paid under current statutory systems. An ability to reduce entry level salaries in addition to an ability to refuse annual adjustments of salaries for those who perform satisfactorily as permitted in the draft regulations will by definition conspire to reduce DOD salaries.

Strong and unambiguous safeguards must be in place to prevent lowering of pay for the DOD civilian workforce. There must be constraints on the ability of DOD to lower salaries or withhold salary adjustments across the board. These safeguards must be established not only to protect the living standards of the civilian DOD workforce relative to the rest of the Federal workforce, but also to guarantee the ongoing economic vitality of communities with DOD installations.

Finally, procedures for deciding who will be affected by reduction in force must be based on more than a worker's most recent performance appraisal. Incredibly, the proposed NSPS regulation will allow an employee with 1 year of service and an outstanding rate to have superior retention rights to an employee with 10 years of outstanding appraisals and 1 year of having being rated merely above average. Such rules are patently unfair and must not be allowed to stand.

In conclusion, Mr. Chairman, it cannot be emphasized strongly enough that the approach DOD has taken thus far exhibited by the above examples has been profoundly demoralizing for its civilian workforce. These dedicated and patriotic Americans are extremely unsettled by the harsh prospects set forth in the proposed regulations, because they are not fooled by words like modern, flexible, and market-based.

Instead, they see fundamental rights stripped away and a pay system leading to lower overall DOD pay. We strongly urge the Committee to take action either legislatively or through oversight to require DOD to correct the many problems with the draft regulations and provide the safeguards I've mentioned. Unless substantial changes are made to the regulations, the NSPS will become a recruitment and retention problem rather than a solution that will deflect the agency from its important mission for years. Thank you, Mr. Chairman. I'd be happy to answer any questions.

[The prepared statement of Mr. Gage follows:]

PREPARED STATEMENT BY JOHN GAGE

Mr. Chairman and members of the committee: My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 200,000 civilian employees of the Department of Defense (DOD) represented by AFGE, I thank you for the opportunity to testify today. I am also pleased to appear on behalf of the 700,000 employees represented by the 36 unions of the United DOD Workers Coalition.

AFGE has numerous serious concerns with the draft regulations that DOD published on February 14 to create the National Security Personnel System (NSPS). The comments that AFGE submitted during the public comment period that ended in March, through our participation in the United DOD Workers Coalition, are attached to this statement for your review. They contain our detailed critique of the Department's proposals with regard to collective bargaining, employee appeals of ad-

verse actions, and the establishment of a pay for performance system to replace existing statutory pay systems.

Today I will focus my statement on some of the most urgent practical issues related to the proposed DOD regulations that demand immediate attention. Although our union strongly opposes the replacement of objective, statutory pay systems with inherently subjective and nominally performance-based pay systems, the revocation of employee appeal rights, and the evisceration of collective bargaining; my purpose here is to spell out what we and others who have closely followed DOD's efforts on NSPS believe needs to be done to avoid a disaster that will have enormous financial and national security ramifications.

It is important to recall the stated objectives of the NSPS as well as the language of the law that established the Defense Secretary's authority to create it. On June 4, 2003, Defense Secretary Donald Rumsfeld testified before the Senate Governmental Affairs Committee regarding the NSPS. In that testimony, he claimed that NSPS was necessary "so our country will be better prepared to deal with the emerging 21st century threats" and promised Congress that "here is what the National Security Personal System will not do, contrary to what you may have read: . . . It will not end collective bargaining. To the contrary, the right of Defense employees to bargain collectively would be continued. What it would do is to bring collective bargaining to the national level, so that the Department could negotiate with national unions instead of dealing with more than 1,300 different union locals—a process that is grossly inefficient." (Emphasis in original).

But Secretary Rumsfeld's promises have not been kept. Nothing in the proposed NSPS regulations is perceptibly connected to "21st century threats." His Department has issued draft regulations that do effectively end collective bargaining by prohibiting bargaining on almost all previously negotiable issues, and granting the agency the authority to unilaterally void any and all provisions of collective bargaining agreements via the issuance of internal regulations and issuances. That is only one aspect of the NSPS that is wholly insupportable to DOD's workforce. Furthermore, regarding his claimed urgency national level bargaining: National level bargaining became effective upon the passage of the act in 2003. In spite of this fact, the Secretary has not yet invoked national level bargaining even once.

At this stage, the goal of NSPS should be the development of a system that both adheres to the law and can be successfully implemented. In spite of the fact that DOD's proposed regulations are so extreme and so punitive, we remain hopeful that DOD will reconsider its approach in the context of a realization that the nuts and bolts of implementation require more sober calculations than those exhibited in the draft regulations.

It cannot be emphasized strongly enough that the approach DOD has taken thus far has been profoundly demoralizing for its civilian workforce. This dedicated and patriotic workforce is extremely unsettled by both the inaccurate information conveyed by the Secretary, and by the harsh prospects set forth in the proposed NSPS regulations. This state of affairs is neither desirable nor inevitable. But alleviating it is in DOD's hands.

It is not too late for DOD to decide to work with its unionized employees, rather than against us, so that the implementation of a new system and its procedures is smooth, and conducive to high morale and continued focus on the Department's national security mission.

#### SIX "FLASHPOINT" ISSUES

To that end, I have highlighted six "flashpoint" issues that constitute only the most egregious examples of areas where the draft regulations for NSPS have deviated from both the law and the stated objectives of Secretary Rumsfeld when he testified in 2003 that NSPS would be merely a source of freedom from the "bureaucratic processes of the industrial age" to meet the "security challenges of the 21st century."

1. DOD has proposed radically reducing the scope of collective bargaining in the proposed regulations. The scope of bargaining must be restored so that the very institution of collective bargaining can continue to exist in DOD. In fact, the proposed NSPS effectively eliminates collective bargaining by greatly expanding the management rights clause as compared to current law, thereby rendering most previously negotiable issues to be "off the table." When the legislation authorizing NSPS was under consideration by Congress, Defense Secretary Rumsfeld assured Congress that his only intent with regard to collective bargaining was to establish national-level bargaining over most issues. The proposed regulations do not follow the law with respect to its instructions to maintain collective bargaining

rights for affected DOD employees. In addition, DOD must not be permitted to unilaterally override provisions of collective bargaining agreements by issuing either component-wide or Department-wide "issuances." This makes a mockery of collective bargaining and the resulting agreements.

2. The board that hears labor-management disputes arising from NSPS must be independent of DOD management. In the proposed NSPS regulations, DOD would establish an internal board made up entirely of individuals appointed by the Secretary. Such a board would have no independence or credibility, and would therefore fail to meet the standards set forth by the Comptroller General for transparency, fairness, and credibility. In addition, Secretary Rumsfeld promised Congress prior to the enactment of the law authorizing the establishment of NSPS that any board established to hear disputes arising from NSPS would be independent. Although there is no rationale for DOD to have an internal labor board which duplicates the functions and costs of the Federal Labor Relations Authority; if it must exist, it is absolutely critical that it be entirely separate and distinct from DOD management.

3. The standard for mitigation by the Merit Systems Protection Board (MSPB) of discipline and penalties imposed on employees under NSPS in the proposed regulations is virtually impossible to meet and effectively removes the possibility of mitigation. DOD must change the standard from "wholly unjustified" to "unreasonable," the court imposed standard established over 25 years ago, in order for employees to have a meaningful right to have adverse actions mitigated by the MSPB. Further and in contrast to current law, the proposed NSPS adds additional bureaucratic delay by declaring that adverse action arbitrations will no longer be final and binding. Instead, they will have to be reviewed by the MSPB, thereby reducing the rule and power of arbitrators, which is entirely insupportable and contrary to congressional intent. Since DOD wins close to 90 percent of its current MSPB cases, there is simply no justification for eliminating a fair adjudicative process for employee appeals.

4. Performance appraisals will be the crucial determinant of salary, salary adjustment, and job security under NSPS. Yet under the proposed regulations, not only is there no requirement for management to present written standards against which performance will be measured, but employees are also denied the right, available to all current Federal employees, including those under the new Homeland Security Personnel System, to use a negotiated grievance and arbitration system to present evidence to an impartial body that their performance appraisals are inaccurate. These inequities must be rectified in order for NSPS to meet the principle affirmed by Congress, the Comptroller General, and several experts that the performance management systems that underlie "performance-based" personnel systems be "transparent," "accountable," and perceived as fair and credible by employees.

5. Strong and unambiguous safeguards must be in place to prevent a general lowering of pay for the DOD civilian workforce. The proposed regulations permit a general reduction in salaries for all DOD personnel compared to rates they would have been paid under statutory systems. An ability to reduce entry level salaries, in addition to an ability to refuse annual adjustment of salaries for those who perform satisfactorily, as permitted in the draft regulations, will by definition conspire to reduce DOD salaries generally. Consequently, there must be constraints on the ability of DOD to lower salaries or withhold salary adjustments generally. These safeguards must be established not only to protect the living standards of the civilian DOD workforce relative to the rest of the Federal workforce, but also to guarantee the ongoing economic vitality of communities with DOD installations.

6. Procedures for deciding who will be affected by a Reduction in Force (RIF) must be based on more than a worker's most recent performance appraisal. The proposed NSPS regulation would allow an employee with 1 year of service and an outstanding rating to have superior retention rights to an employee with 30 years of outstanding appraisals and 1 year of having been rated merely "above average." Such RIF rules are patently unfair and must not be allowed to stand.



## SALARY DETERMINATION AND PERFORMANCE MANAGEMENT

*Pay and Classification*

DOD's proposed regulations indicate its desire for radical change to pay and classification systems, and, as the law requires, creation of a pay-for-performance system "to better link individual pay to performance, and provide an equitable method for appraising and compensating employees." No objective data or reliable information exists to show that such a system will enhance the efficiency of DOD operations or promote national security and defense. As with the proposed system at the Department of Homeland Security, most of the key components of the system have yet to be determined.

One thing, however, is clear. The design, creation and administration of the concept DOD has proposed will be complex and costly. A new level of bureaucracy would have to be created, and given DOD's ideology and proclivities, it is highly likely that this costly new bureaucracy would be outsourced to provide some lucky private consultants with large and lucrative contracts. This private consultant would then make the myriad, and yet-to-be identified, pay-related decisions that the new system would require. Although the contractors who anticipate obtaining this new "make-work" project are undoubtedly salivating over the prospect, our country would be better served if the resources associated with implementing and administering these regulations were dedicated more directly to protecting national security and defense.

The unions told DOD during our meetings last year that until these and other important details of the new system have been determined and piloted, the undefined changes cannot be evaluated in any meaningful way. Unfortunately, we are now forced to exercise our statutory collaboration rights on vague outlines, with no fair opportunity to consult on the "real" features of the new classifications, pay and performance system. This circumvents the congressional intent for union involvement in the development of any new systems, as expressed in Public Law 108-13.

Accordingly, we have recommended to DOD that the pay, performance, and classification concepts be withdrawn in their entirety and published for comment and recommendations only when: 1) the Agencies are willing to disclose the entire system to DOD employees, affected unions, Congress, and the American public; and 2) the Agencies devise a more reasonable approach to testing any radical new designs before they are implemented on any widespread basis. It is simply wrong to ask us to accept systems that establish so few rules and leave so much to the discretion of current and future officials. As the representatives of DOD employees, it is our responsibility to protect them from vague systems, built on discretionary authority that is subject to abuse.

Regardless of the ultimate configuration of the pay proposal, we believe that any proposed system must contain the transparency and objectivity of the General Schedule. Critical decisions on pay rates for each band, annual adjustments to these bands and locality pay supplements and adjustments must be made in public forums like the U.S. Congress or the Federal Salary Council, where employees and their representatives can witness the process and have the opportunity to influence its outcome through collective bargaining. We are concerned that these decisions would now be made behind closed doors by a group of DOD managers (sometimes in coordination with OPM) and their consultants. Not only will employees be unable to participate in or influence the process, there is not even any guarantee that these decisions will be driven primarily by credible data, or that any data used in the decisionmaking process will be available for public review and accountability, as the data from the Bureau of Labor Statistics is today.

If the system DOD/OPM has proposed is implemented, employees will have no basis on which to predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual increase at all, despite having met or exceeded all performance expectations identified by DOD. The "pay-for-performance" element of the proposal will pit employees against one another for allegedly performance-based increases.<sup>2</sup> Making DOD employees compete among themselves for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe at home and abroad.

It is also unclear from the current state of the deficit that funds will be made available for performance-based increases to become a plausible reality, one of many facts that has DOD employees concerned and skeptical about this proposal. As a

<sup>2</sup>This element of the proposal does not really qualify as a "pay for performance" system. Employees performing at an outstanding level could not, under the proposal, ever be certain that they would actually receive pay commensurate with their level of performance.

practical matter, the Coalition has voiced its concern that DOD's ambitious goal to link pay for occupational clusters to market conditions fails to address the reality that pay for DOD employees is tied to Congressional funding, not market conditions. Indeed the Federal Employees Pay Comparability Act (FEPCA), the law that added a market-based locality component to the market-based General Schedule has never been fully funded, for budgetary reasons. That is, the size of the salary adjustments paid under FEPCA to GS employees has, except for once in 1994, reflected budget politics rather than the market data collected by the Bureau of Labor Statistics (BLS) to support the system.

Since the draft NSPS regulations were published, they have received important practical criticism from several sources, including Comptroller General David Walker who has testified twice regarding the DOD's readiness to implement any part of its proposed NSPS. We cite his testimony at length because it makes the case so forcefully that DOD has failed to prepare for implementation by failing to fully elaborate its design, collaborate with unions representing affected employees, or train its managers and bargaining unit employees; all of which are well-known prerequisites for any measure of success. In his testimony, he cites the Government Accountability Office's (GAO) previous reports and testimony regarding the management of "human capital" in Federal agencies, including GAO.

On March 15, 2005, Mr. Walker described his views on the strengths and weaknesses in DOD's attempt at "strategic human capital management" as embodied in the agency's proposed NSPS, using as reference the advice he gave to the House Committee on Government Reform's Subcommittee on Civil Service and Agency Organization on April 23, 2003 as it considered the NSPS legislation as well as a March 2003 GAO publication that listed nine attributes GAO thought needed to be present in order to create "clear linkage between individual performance and organizational success."

In April 2003, when the legislation granting the Defense Secretary the authority to establish NSPS was still under consideration, Mr. Walker testified that "the bottom line is that in order to receive any performance-based pay flexibility for broad based employee groups, agencies should have to demonstrate that they have modern, effective, credible, and as appropriate, validated performance management systems in place with adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to ensure fairness and prevent politicalization and abuse." Later he elaborated on this set of prerequisites as follows, calling them "statutory safeguards":

- "Assure that the agency's performance management systems (1) link to the agency's strategic plan, related goals, and desired outcomes, and (2) result in meaningful distinctions in individual employee performance. This should include consideration of critical competencies and achievement of concrete results.
- Involve employees, their representatives, and other stakeholders in the design of the system, including having employees directly involved in validating any related competencies, as appropriate.
- Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process (e.g., independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay determinations, and promotion actions before they are finalized to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership is predominately made up of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions).
- Assure reasonable transparency and appropriate accountability mechanisms in connection with the results of the performance management process (e.g., publish overall results of performance management and pay decisions while protecting individual confidentiality and report periodically on internal assessments and employee survey results). (Emphasis added)

The Comptroller General's March 2005 testimony listed six areas where the proposed NSPS regulations either fell short of the GAO's principles, or where too little detail or information was provided to make an evaluation. The six were as follows:

- (1) "DOD has considerable work ahead to define the details of the implementation of its system, including such issues as adequate safeguards to help ensure fairness and guard against abuse." (emphasis added)

(2) Although the proposed NSPS regulations would “allow the use of core competencies to communicate to employees what is expected of them on the job” (emphasis added), it does not require this. It should be noted that the 2003 GAO statement does not suggest requiring the use of core competencies, only allowing them. Now GAO says that requiring the use of core competencies helps create “consistency and clarity in performance management.”

(3) The NSPS proposed regulations contain no “process for continuing involvement of employees in the planning, development, and implementation of NSPS.”

(4) DOD needs a Chief Management Officer to oversee human resources management in order to “institutionalize responsibility for the success of DOD’s overall business transformation efforts” because they believe that this void is partially responsible for the failure of previous DOD reform efforts.

(5) An effective communications strategy that “creates shared expectations among employees, employee representatives, managers, customers, and stakeholders” would be beneficial. DOD has no such communications strategy in place.

(6) Finally, GAO’s testimony asserts that DOD does not have an “institutional infrastructure in place to make effective use of its new authorities,” by which it means that DOD needs a “human capital planning process that integrates DOD’s human capital policies, strategies, and programs with its program goals and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and importantly, a set of adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to help ensure the fair, effective, and credible implementation and application of a new system.”

These six shortcomings are essentially identical in content to the four “statutory safeguards” the Comptroller General said in 2003 had to be present for a system to be successful in furthering an agency’s mission and preventing politicization and abuse. As such, it is fair to say that GAO appears to agree with us that DOD has failed thus far to design a system that is either workable or that adheres to the principles GAO has identified for performance-based systems that protect the merit system.

The Partnership for Public Service, an organization dedicated to the restoration of the good name of Federal employment, has also weighed in on the issue of what makes for a successful performance-based management and pay system for public employees. The Partnership echoes many of the arguments advanced by the GAO, but warns that pay for performance systems are not ends in themselves, but rather “one means toward the end of creating a high performance culture” linked to the goal of “boosting government effectiveness.” This is significant because although the stated rationale for the establishment of the NSPS was supposed to be an enhanced ability to meet emerging “21st century security challenges” DOD has thus far refused an approach that makes use of explicit, objective, written performance standards tied to agency mission.

The Partnership cautions that differences between the private and public sectors must be at the forefront when designing pay for performance systems because of the unique attributes and challenges that Federal agencies face. In particular, the Partnership identifies “three unique challenges: 1) performance metrics can be harder to develop and measure for organizations with a public mission, as compared to companies focused simply on maximizing profits, 2) workers may be less motivated by cash rewards and more by the ability to make a difference, which can lessen the impact of monetary incentives, and 3) the greater power and flexibility given to managers can complicate civil service protections against inappropriate political interference.”

Nowhere in the proposed NSPS regulations is there any evidence that DOD has acknowledged the unique challenges posed by the fact that it is a Federal agency with a public mission. No concession has been made to the special importance of accountability for the distribution of public funds, or the impact of draconian treatment on the accomplishment of a national security mission.

The Partnership’s work on the subject of pay for performance systems in the Federal Government also stresses the importance of “extensive training of supervisors so they have the skills needed to make accurate assessments of individual performance.” The implementation or “spiral” schedule DOD has set neglects entirely the importance of such training. This factor as much as any other that will decide whether the NSPS pay for performance turns into a costly scandal resulting in vast quantities of litigation and confusion.

The Partnership's final caution is that unless Congress provides adequate additional resources to allow "meaningful" financial rewards to high performers that distinguish them not only from "low performers" but also from what they would have received under a statutory system, pay for performance will not be successful as a motivator of higher performance. Of course, such additional resources should not be granted to DOD management unless and until a fair, transparent, and accountable "performance appraisal" process is in place so that taxpayers can know that their precious tax dollars are not being distributed on the basis of politics or other non-merit factors.

#### LABOR RELATIONS

Notwithstanding the substantive arguments in our attached comments, our Union Coalition believes that the procedures for generating changes in the Labor Management Relations system have, thus far, been contrary to the statutory scheme proscribed in the National Defense Authorization Act for Fiscal Year 2004, Section 9902(m), Labor Management Relations in the Department of Defense.

This portion of the law describes a very specific manner of statutory collaboration with time lines, which has not been followed. The law requires that employee representatives participate in, not simply be notified of, the development of the system. We ask that the subcommittee investigate DOD's failure to enforce or observe this aspect of the law.

Public Law 108-136 protects the right of employees to organize, bargain collectively, and to participate through labor organizations of their own choosing in decisions that affect them. Specifically, the coalition has reiterated that Congress intended to have the NSPS preserve the protections of title 5, chapter 71, which DOD's proposals attempt to eliminate. DOD's position, made manifest in its proposed regulations, is that chapter 71 rights interfere with the operation of the new human resources management system it envisions and hopes to implement. Despite this congressional mandate to preserve the protections of chapter 71, DOD's proposed regulations will:

1. Eliminate bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights.
2. Eliminate bargaining over otherwise negotiable matters that do not significantly affect a substantial portion of the bargaining unit.
3. Eliminate a union's right to participate in formal discussions between bargaining unit employees and managers.
4. Drastically restrict the situations during which an employee may request the presence of a union representative during an investigatory examination.
5. Eliminate mid-term impasse resolution procedures, which would allow agencies to unilaterally implement changes to conditions of employment.
6. Set and change conditions of employment and void collectively bargained provisions through the issuance of non-negotiable departmental or component regulations.
7. Assign authority for resolving many labor-management disputes to an internal Labor Relations Board, composed exclusively of members appointed by the Secretary.
8. Grant broad new authority to establish an entirely new pay system, and to determine each employee's base pay and locality pay, and each employee's annual increase in pay, without requiring any bargaining with the exclusive representative.

Our unions have expressed strong objections to DOD's total abandonment of chapter 71, along with the law associated with the statute's interpretation. We ask that the subcommittee join us in reaffirming to DOD that Congress intended to have chapter 71 rights upheld so that DOD cannot hide behind its false contention that Congress' intent was unclear. Chapter 71 should be the "floor" of any labor relations system DOD designs. However, the design of DOD's plan is to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. We know that when Congress enacted provisions to protect collective bargaining rights, it did not intend that those rights be eviscerated in the manner that DOD's proposed regulations envision. Indeed, any regulation reflecting any of the issues listed above will be entirely unacceptable to us, and we strongly believe, unfounded in either the legislation or the law.

## RESTRICTIONS ON COLLECTIVE BARGAINING

The NSPS-imposed shift from statutory pay systems such as the General Schedule and the Federal Wage System to an as yet undefined pay for performance system will have profound consequences for the DOD workforce, but the degree of its impact will vary from worker to worker and depend upon numerous factors such as funding, training, and whether accountability safeguards and procedures are attempted or prohibited. In contrast, the proposed restrictions on collective bargaining contained in DOD's proposed NSPS regulations would by definition harm everyone in a bargaining unit equally because the proposals are uniformly negative.

For this reason, it is useful to consider the effects of taking five particular issues "off the table" that have been successfully negotiated by Federal agencies including DOD: overtime policy, shift rotation for employees, safety and health programs, flexitime and alternative work schedules, and deployment away from regular work locations.

Currently, title 5 U.S. Code, chapter 71 allows negotiation of collective bargaining agreements, and negotiation of procedures and appropriate arrangements for adversely affected employees in the exercise of a management right. These allow management and the union to bargain provisions that address the effects of management actions in specific areas. Such bargaining can be either in negotiation of term agreements or negotiations during the life of such agreements in response to management-initiated changes. However, under the draft regulations for NSPS, unions and management will no longer be permitted to bargain over "procedures and appropriate arrangements," including over simple, daily, non-security related assignments of work.

The following are five examples of current DOD labor-management contract provisions which would no longer be negotiable under NSPS.

#### 1. *Overtime Policy*

In general, AFGE locals negotiate overtime policies using two basic premises. First, the union's interest is in having management assign overtime work to employees who are qualified to perform the work and who normally perform the work. Second, the union seeks a fair and consistent means of assigning or ordering overtime, so it is not used as an arbitrary reward or punishment. Prior to being able to negotiate the fair rotation of overtime, it is significant to note that employees filed hundreds of grievances over denial of overtime. Since procedures have been negotiated, clear, transparent, and known; these grievances have literally disappeared.

In negotiations, AFGE locals have requested that overtime should be first offered, then ordered. By treating overtime first as an opportunity, workers, based on their personal circumstances, get an opportunity to perform extra work for overtime pay (paid at time and a half) or compensatory time (paid hour per hour).

Commonly, contract language requires overtime to be offered to employees within specific work units, job descriptions or occupational fields to ensure employees performing the work are qualified. Additional contract language allows for the assignment or ordering of overtime if a sufficient number of employees do not volunteer to perform the necessary work. Normally, employee seniority is applied in determining which volunteers will receive the overtime (most senior) and reverse seniority (least senior) in ordering overtime in the absence of volunteers.

This basic contract language over the procedures to be used in assigning overtime provides predictability for both employees and management in dealing with workload surges that force the use of overtime in organizations. Organizations that frequently rely on overtime will usually adopt an overtime scheduling roster.

Under current law, the agency has the right to "assign work" which would include overtime assignments. However, the statute requires bargaining over procedures and appropriate arrangements for employees affected by the exercise of a management right if requested by the union. In this way, Federal employee representatives are permitted to bargain over important issues dealing with overtime.

However, under the proposed NSPS regulations, both overtime policies in current contracts, as well as the unions' right to negotiate similar provisions in the future are undermined. Specifically, management could issue a department or even a component level policy or issuance that would negate current contract language dealing with overtime procedures and preclude further negotiations.

In addition, the new NSPS management rights section prohibits DOD managers from bargaining over the procedures they will use when exercising their management rights, which would include assigning overtime.

## 2. *Shift Rotation for Employees*

In industrial DOD settings, shift work is common. Usually there are three shifts: day, evening, and graveyard. Although an evening or graveyard shift may appear unattractive to some, others may prefer such shifts due to increased rates of pay, or because they help the worker handle child or elder care responsibilities with a spouse who works a day shift. Shift work assignment is a frequent subject for bargaining, with the union's primary focus on providing predictability and stability in workers' family and personal lives and on equitable sharing of any shift differentials (increased pay) or burdens of work performed outside the normal day shift. Contract language often calls for volunteers first, then the use of seniority when making decisions about shift work, or provides for the equitable rotation of shifts.

Under current law, management is permitted to negotiate over the numbers, types and grades of employees or positions assigned to a tour of duty and is required to bargain over the procedures it uses to exercise its right to assign work, including assignments to shift rotations.

However, under the proposed NSPS regulation, both shift work policies in current contracts as well as the unions' right to negotiate similar provisions in the future are undermined. Specifically, management could issue a department or even component level policy or issuance that would negate current contract language dealing with shift work and preclude further negotiations.

In addition, the new NSPS management rights section includes assignment of work, and determining the employees or positions assigned to a work project or tour of duty, making this no longer a permissive subject of bargaining, but a prohibited matter. The proposed regulation goes on to specifically prohibit management from negotiating over the procedures used to exercise such rights, including assignments to shift rotations.

## 3. *Safety and Health Programs*

Worker safety and health has always been of paramount importance to unions. Many AFGE locals representing DOD's blue collar industrial workforce have negotiated, over many years, comprehensive safety programs and often are involved in negotiated workplace safety committees with the employer.

For example, today's state-of-the-art welding operations in DOD's industrial operations exist as the result of years of negotiation over workplace safety practices, personal protective equipment, training, technologies and practices, ventilation and moving to safer, newer welding practices. These practices have not only protected employees, but have saved countless DOD dollars in the elimination of on-the-job-injuries, lost time due to accidents, improved work processes and prevented financial losses as the result of destroyed or damaged material and equipment.

Currently, safety and health matters are covered by a section of the law which allows, at the election of the agency, bargaining over issues dealing with technology, methods, and means of performing work. In addition, negotiations are required over appropriate arrangements for employees adversely affected by the exercise of management's rights.

The proposed NSPS regulations threaten both safety and health policies in current contracts, as well as the unions' right to negotiate similar provisions in the future. Specifically, management could issue a department or even component level policy or issuance that would negate current contract language dealing with safety and health policies and preclude further negotiations.

In addition, the new NSPS management rights section includes technology, methods, and means of performing work, making this no longer a permissive subject of bargaining, but a prohibited matter. The proposal limits severely the types of provisions that could be negotiated as "appropriate arrangements."

## 4. *Flexitime and Compressed Work Schedules*

Under chapter 61 of title 5, U.S. Code, Federal employees may work under flexitime and compressed schedules. Examples of flexitime are 7 a.m. to 4 p.m. or 9:30 a.m. to 6:30 p.m., rather than the traditional 8 a.m. to

5 p.m. shift. Examples of compressed work schedules are Monday through Thursday for 10 hours per day with Friday off, or Tuesday through Friday for 10 hours per day with Monday off, rather than 8 hours per day Monday through Friday. Today's DOD installations often operate daily on a 10 to 12 hour business day meeting customer demands longer and faster than ever before in the department's history.

Legislation authorizing flexitime and compressed work schedules was enacted to assist employees in handling job, family and community responsibilities. In addition, Congress recognized that such schedules would go a long way toward improving commuting times in crowded metropolitan areas.

Ensuring sufficient choices for employees and protecting the capability to perform the vital work of the department have always been the two guiding principles used in bargaining these arrangements. Currently, work schedule options include core hours, permitted changes by employees, and protections for management in ensuring completion of the agency mission.

Flexitime and compressed work schedules are negotiated under provisions of title 5, chapters 61 and 71, which provide that for employees in a unit represented by a union, establishment and termination of such work schedules, "shall be subject to the provisions of the terms of . . . a collective bargaining agreement between the agency and the exclusive representative."

In contrast, the proposed NSPS regulations threaten flexitime and compressed work schedules in current contracts as well as the unions' right to negotiate similar provisions in the future. Specifically management could issue a department or even a component level policy or issuance that would negate current contract language dealing with flexitime and compressed work schedules, and preclude further negotiations.

In addition, the new NSPS management rights section specifically prohibits management from negotiating over the procedures used to exercise its rights and limits severely the types of provisions that could be negotiated as "appropriate arrangements." Both of these factors could further limit or eliminate bargaining over alternative schedules.

##### *5. Deployment Away From Regular Work Location*

Today, DOD reshapes its workforce and makes assignments to locations different from an employee's normal workplace using reorganizations, transfers of function, details, and in the use of designated positions requiring travel or deployment. In most instances, the union and management deal with these instances on a case-by-case basis. This allows bargaining for the specific circumstance and avoids imposing a one-size-fits-all agreement.

Collective bargaining agreement protections include such things as the use of volunteers, then seniority, (as described in other sections of this paper) coupled with requirements that the work be performed by qualified employees. (Of course, management has the right to set qualifications as it sees fit.) In some cases, there are also provisions calling for advance notice whenever possible.

Under current law, management has the right to "assign work . . . and to determine the personnel by which agency operations shall be conducted." However management and unions can negotiate the procedures management uses in exercising their authority and appropriate arrangements for employees adversely affected by such authority.

The proposed NSPS regulations specifically prohibit management from negotiating over the procedures used to exercise its rights to assign work and determine the personnel by which agency operations are conducted. In addition, the draft regulation limits severely the types of provisions that could be negotiated as "appropriate arrangements." This will have the effect of erasing the current rules that the parties have negotiated to preserve the rights of a employees to choose where they work and live, and preclude further negotiations.

Under NSPS, agency officials could move employees arbitrarily or force a prolonged assignment anywhere in the world without regard to any hardship this could cause employees or their families. They could deploy an employee whose family obligations make absence an extreme hardship even if a similarly qualified employee volunteered for the assignment.

In some cases, employees will be forced to make choices between family and job. Management will be able to exercise its right to assign employees

and leave any collective bargaining out of the process, including the limited procedural and appropriate arrangement requirements now in current law.

The consequences of eliminating bargaining for dealing with overtime policies, shift rotation, safety and health programs, flexitime and compressed work schedules, deployment away from regular work locations, and other important workplace issues will likely include worker burnout, increased danger to workers in unsafe situations, and strong feelings of unfairness within work units if assignments and work schedules are not offered or ordered in a fair and consistent manner. Ultimately, the inability of the employees' representatives to resolve these matters through collective bargaining will create recruitment and retention problems for the Department, as employees find more stable positions in other Federal agencies, or with state and local governments. Importantly, depriving DOD's operational managers and unions of the right to negotiate mutually agreeable arrangements over these issues is in no way connected to the Secretary's stated goal of meeting "the security challenges of the 21st century."

#### EMPLOYEE APPEALS

Public Law 108-13 reflects Congress's clear determination that DOD employees be afforded due process and be treated fairly in appeals they bring with respect to their employment. When it mandated that employees be treated fairly and afforded the protections of due process, and authorized only limited changes to current appellate processes, Congress could not have envisioned the drastic reductions in employee rights that DOD's proposed regulations set forth.

No evidence has ever been produced to suggest, let alone demonstrate, that current employee due process protections or the decisions of an arbitrator or the MSPB have ever jeopardized national security and defense in any way. While we believe in an expeditious process for employee appeals, we will never be able to support biasing the process in favor of management or otherwise reducing the likelihood of fair and accurate decisions. DOD has provided absolutely no research that shows that the drastic changes proposed to chapters 75 and 77 of title 5 would further the agency mission.

#### CONCLUSION

We urge the committee to take action, either legislatively or through oversight, to require DOD to address at least the six "flashpoint" issues described above. Performance appraisals must be based upon written standards and be subject to negotiated grievance and arbitration procedures. Strong and unambiguous safeguards must be established to prevent either a general reduction or stagnation in DOD salaries. The scope of collective bargaining must be fully restored, and DOD must not be permitted the ability to unilaterally void provisions of signed collective bargaining agreements. Any DOD-specific labor-management board must be independent from DOD management. Standards for MSPB mitigation need to be realistic. Finally, RIF procedures must be based upon factors beyond a worker's most recent performance appraisal. A failure on the part of DOD to address these basic issues related to fairness, transparency, and accountability will guarantee that NSPS becomes a source of corruption, scandal, and mismanagement and will deflect the agency from its important national security mission for years.

Chairman WARNER. Thank you, Mr. Gage. Ms. Sistare, would you be kind enough to describe your distinguished career briefly.

Ms. SISTARE. Thank you very much. Thank you for giving me the opportunity to testify today. I'm the Director of the Human Resources Management Consortium at the National Academy of Public Administration (NAPA), which is a nonprofit, independent, non-partisan organization chartered by Congress. I've also been Executive Director of the National Commission on the Public Service, which was chaired by former Federal Reserve Board Chairman Paul Volcker.

That Commission continues on at the Academy today with an implementation initiative. I actually spent most of my career as a staff member in the United States Senate, where I worked for three Senators, most recently as staff director and counsel for



Chairman Fred Thompson on the Senate Governmental Affairs Committee.

Chairman WARNER. Thank you very much, and thank you particularly for your service to the Senate. You are welcome to return.

Ms. SISTARE. Thank you very much.

Chairman WARNER. If we don't get this thing straightened out, I might draft you.

**STATEMENT OF HANNAH S. SISTARE, DIRECTOR, HUMAN RESOURCES MANAGEMENT CONSORTIUM; EXECUTIVE DIRECTOR, NATIONAL COMMISSION ON THE PUBLIC SERVICE IMPLEMENTATION INITIATIVE, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION**

Ms. SISTARE. My testimony today addresses three parts of the proposed regulations: performance management, appeals, and labor. I'll raise suggestions for future action. Although I quote several Academy studies, I'm speaking on my own and not on behalf of the Academy as an institution.

On performance management, both the Volcker Commission and panels of the Academy have concluded that pay for performance within the performance management system can enhance employee engagement and morale, organizational improvement, and program results.

It can also help dispel some of the negative stereotypes that Federal workers have to bear which undermine public confidence in government. DOD is actually at an advantage compared to other Federal departments in this respect. Research shows that the workers at DOD have a much stronger sense of mission and how their work relates to that mission than do employees in other departments.

Among the experts there is certainly a broad consensus on the elements that make a pay for performance system work. A year and a half ago the Academy and the Volcker Commission co-hosted a forum where we brought together stakeholders, public administrators, and government leaders. The participants agreed on four key factors that need to be recognized up front. It takes time. It's complicated, it requires culture change. It also requires adequate funding.

The participants also identified elements that they saw as critical to making this kind of system work. They include processes that are timely and linked to distinctions in pay, committed and highly involved leadership, ongoing feedback from everyone involved, a system that effectively deals with poor performers, training and evaluation of managers and supervisors, and accountability for how they run the system. Appropriate and effective employee training and organizationally integrated performance management system are what the GAO calls a "clear line of sight" between what the employee does and what the organization's mission is.

They also noted some safeguards: transparency, accountability, internal checks and balances, peer review, and ongoing communication. Managers in particular are key to the success of this kind of system.

I met this week with attendees of the Federal Manager's Association (FMA) week in Washington. Most of the participants were from the DOD and were from all around the country.

They, really to a person, were interested, willing, and ready to learn. They didn't feel they were there yet. They wanted to know a lot. But they were ready to take the system on.

On appeals, we addressed the Federal appeals system at another Academy/Commission forum and our speakers were from labor, from the administration, and others. We had a broad range of people participating in the discussion.

When asked the question of what set of principles should underlie any Federal employee system, the group very quickly came to a consensus and they identified four key principles: Fair, including the perception of being fair; fast and final action with due process; protection of merit system principles; and consideration to protecting the agency's mission.

As we have heard, OPM, DOD, and the employees' unions disagree strongly about whether this new system is in fact fair. So we have a problem certainly with perceptions. I suggest several possible remedial steps that the parties could take to collaborate right now in putting clear definition to some of the significant aspects of the proposed system.

One is they could define the standards that the National Security Labor Relations Board (NSLRB) will apply when they are weighing the need to protect the Department's mission. Another is to develop standards for the merit selection of the individuals serving on the NSLRB and also to identify as my colleague mentioned the mandatory removal offenses in collaboration with the stakeholders in the system. I think that kind of collaboration at this time could ease a lot of employee concerns. Labor relations are certainly the key problem in this area, area of greatest challenge. The Volcker Commission recognized this.

The Volcker Commission met during the period when the Department of Homeland Security legislation was being developed. So they felt that labor relations would definitely pose a challenge to Civil Service reform and they noted several existing models at the local, State, and Federal level where government leaders and employee unions really reached out to work constructively to accomplish their mutual goals.

The common characteristic of these models is that they were mutual efforts that went the extra mile to enhance communication and consensus. In the end, it's important that there be a mutual commitment to the goals of the NSPS when the regulations become effective. It's important that everyone work together to try to make them work.

I think these goals include a highly-engaged, well-qualified workforce, working in concert with DOD leadership to achieve the Department's important public mission.

In conclusion, one point I'll mention is the Volcker Commission was very strong on the importance of congressional oversight, and this hearing is just what they believed would be necessary. I'm sure they would strongly support this committee's continued and close involvement as the system is rolled out and implemented. Thank you.

[The prepared statement of Ms. Sistare follows:]

PREPARED STATEMENT BY HANNAH S. SISTARE

Mr. Chairman, members of the committee, I appreciate the opportunity to testify on the design and implementation of the National Security Personnel System at the Department of Defense.

I am the Director of the Human Resources Management Consortium at the National Academy of Public Administration, an independent non-partisan, non-profit organization chartered by Congress to provide “trusted advice” on governance and public management. The views I present today are my own and do not necessarily represent those of the Academy as an institution. I am also the Executive Director of the National Commission on the Public Service Implementation Initiative at the Academy. The National Commission, chaired by former Federal Reserve Board Chairman Paul A. Volcker, made its recommendations for the reform and renewal of the public service in January 2003.

We stand at the threshold of an exciting and challenging time in the transformation of the human resource management systems of the Federal Government—and nowhere is this more true than with respect to the effort underway to modernize the civilian personnel systems of the Department of Defense.

My testimony will address the proposed performance management, appeals and labor relations systems for the Department, and raise some possible approaches for the future.

PERFORMANCE MANAGEMENT/PERFORMANCE BASED PAY

The National Commission on the Public Service and panels of experts at the National Academy of Public Administration have recommended that the Federal Government adopt performance management systems.<sup>1</sup>

The Academy panels and the Volcker Commission have concluded that pay for performance within a performance management system can enhance employee engagement and morale, organizational improvement, and program results. Pay for performance can have the added benefit of dispelling some of the negative stereotypes that plague Federal workers and undermine public confidence in government.

In one respect, DOD is at an advantage compared with other Federal agencies. Research has shown that DOD civilian employees have a much stronger sense both of mission and of how their work contributes to that mission than do employees in other departments.<sup>2</sup> This not only boosts employee morale, but fosters a culture in which employees already connect their work with organizational goals. This will be of help to DOD as it implements its new performance management system.

Some important groundwork has been laid for the implementation of performance based pay. The Government Performance and Results Act helped agencies to clearly define their missions and goals and think about what was required to achieve those missions.

The Government Accountability Office (GAO) certainly has led by example in this area and DOD and other executive branch agencies can learn a great deal by their experience and the lessons GAO continues to draw from it. GAO began to lay the groundwork for its performance management system more than 15 years ago when it adopted pay banding. More recently, legislation enacted by Congress has empowered GAO to take additional steps to put a performance based pay system into place.

Among experts, there is a broad consensus about the elements necessary to make performance management systems work. In September 2003, Academy President C. Morgan Kinghorn and Paul Volcker convened a forum titled “Performance-Based Pay in the Federal Government: How do we get there?” The forum brought together stakeholders, public administrators and government leaders, including OMB Deputy Director for Management Clay Johnson, Deputy OPM Director Dan Blair, and GAO Principal Deputy Gene Dodaro for the purpose of discussing and articulating the elements of a successful system.

The participants agreed on several factors that had to be recognized as central to the adoption of performance based pay in the Federal Government:

- It takes time.

<sup>1</sup> Urgent Business for America: Revitalizing the Federal Government for the 21st Century, Report of the National Commission on the Public Service, January 2003.

Recommending Performance-Based Federal Pay, a report by the Human Resources Management Panel at the National Academy of Public Administration, May 2004.

<sup>2</sup> Paul C. Light, *The Troubled State of the Federal Public Service*, Washington: Brookings Institution, June 27, 2002.

- It is complicated.
- It will require a culture change.
- It requires adequate funding to be fully effective.

The elements the presenters and participants identified as critical to an agency's successful implementation of a performance based pay system were:

- appraisal processes that are timely, transparent, and linked to meaningful distinctions in pay
- committed and highly involved leadership
- ongoing feedback from those who are involved and affected
- a system for effectively dealing with poor performers
- training and evaluation of managers and supervisors that holds them accountable for how well they manage for performance
- appropriate and effective employee training
- an organizationally integrated performance management system which aligns organizational goals with individual performance
- reasonable safeguards including:
  - transparency
  - accountability
  - internal checks and balances
  - peer review
  - ongoing communication and consultation among all system stakeholders

I have provided the forum summary report: Performance Based Pay in the Federal Government—How do we get there? for the committee's information and for the hearing record. It also can be found on the Academy's Web site.<sup>3</sup>

There is broad and clear recognition that all stakeholders in a performance based pay and performance management system must be well trained, and repeatedly trained, for the new systems to be successful.

Managers especially will be key to the success of the new systems, an issue that an Academy panel addressed in a series of five comprehensive reports on The 21st Century Federal Manager published between 2002 and 2004.<sup>4</sup> These reports examine the new and growing challenges that Federal managers face in the 21st century. They also identify and address the new competencies that managers must have to provide the leadership and direction critical to fulfilling government's fast changing needs, and they spell out the price of poor leadership.

The Office of Personnel Management is currently considering the new competencies that 21st century leaders need to be successful, and this will be an important step in the transformation of human resources management at DOD and government-wide.

#### APPEALS

A key to the success of an appeals system is that it not only be fair, but that those affected by it perceive it to be fair. We addressed these issues at a forum on the Federal appeals system convened by the Academy and the Commission Implementation Initiative in September 2003. The speakers at this forum were Chuck Hobbie, Deputy General Counsel of the American Federation of Government Employees; Ron Sanders, OPM Associate Director; and Joe Swerdzewski, former General Counsel of the Federal Labor Relations Authority. The forum participants were a diverse group of Federal officials, congressional staff, academics and other interested private sector stakeholders. As moderator, I posed several questions to the group at the end of the discussion. One was: "What set of principles should underlie any Federal employee appeals system?" The expressed consensus of the group was that there are four key principles:

- fair, including the perception of being fair
- fast and final action with due process
- protection of merit system principles—to preserve the core right so employees and of the general public interest
- consideration of protecting the agency's mission<sup>5</sup>

<sup>3</sup>The Academy's website is [www.napawash.org](http://www.napawash.org). The report Performance Based Pay in the Federal Government: How do we get there?, additional information about the National Commission on the Public Service and the Commission Implementation Initiative at the Academy can be found under "Special Initiatives."

<sup>4</sup>The 21st Century Federal Manager, Volumes 1–5, Human Resources Management Panel, National Academy of Public Administration, 2002–2004.

<sup>5</sup>Conversations on the Public Service: Forum on the Federal Appeals System, National Academy of Public Administration, National Commission on the Public Service Implementation Initiative, February 2004.

Those who designed the proposed NSPS appeals system intend it to be fast and final, and believe it preserves due process and merit system principles. It clearly takes protection of the agency's mission into account. Employee representatives, on the other hand, have raised strong concerns about whether due process is appropriately preserved and to what degree the mission of the Department will be given deference versus the rights of the employees. They do not perceive the proposed system as being fair.

One positive remedial step could be for the DOD, in collaboration with its stakeholders, to clearly define the standards the National Security Labor Relations Board (NSLRB) will apply when weighing the need to fulfill the department's mission. Another would be for DOD to develop standards for the merit selection of the individuals serving on the NSLRB. The merit selection system under which Administrative Law Judges are certified might serve as a model. Likewise, consulting with employee representatives in determining how the mission needs of the Department are to be taken into consideration by the NSLRB and the identifying of Mandatory Removal Offenses could ease employee concerns at this critical time, without undermining the needs of the Department.

#### LABOR RELATIONS

Labor relations have been the area of greatest challenge in the DOD transformation. The legislation authorizing the NSPS anticipated this dynamic and required ongoing consultation between those designing the new personnel system and labor representatives.

The committee is hearing from the DOD, OPM, and union leadership on the details of how this consultation process was carried out preceding the issuance of the proposed regulations. The bottom line is that DOD and OPM believe they met the requirements Congress set out, and the employee unions believe otherwise.

As Senators Susan Collins and Carl Levin and other Members wrote to Secretary England a year ago, "the involvement of the civilian workforce in the design of the new system is critical to its ultimate acceptance and successful implementation."<sup>6</sup> If DOD leadership is at conflict with its own employees, implementation of the NSPS is at risk, they recognized.

The "meet and confer" period required by the law is now underway. This is an opportunity for all involved to consider how this next period of interaction can be conducted so that all parties feel they have made a committed effort, and that a committed effort has been made in turn. Changing perceptions may well require going beyond the specific requirements of the law.

The Volcker Commission made recommendations in this area that could be of value for the future. The Commission wrote its report during the creation of the Department of Homeland Security. Commission members were concerned about the disagreement that accompanied the creation of the Department and cautioned:

[This controversy] makes clear that labor-management relations will pose a challenge to reform. . . . What is clear is that a new level of labor-management discourse is necessary if we are to achieve any serious reform in the civil service system. . . . The commission believes that it is entirely possible to modernize the public service without jeopardizing the traditional and essential rights of public servants. . . . Engaged and mutually respectful labor relations should be a high Federal priority.

In calling for a "new level of discourse" the Volcker Commission suggested that Congress, executive branch leaders and employee representatives consider several existing models for public sector labor management cooperation. These included collaboration by former Governor, now Senator, George Voinovich and the Ohio American Federation of State, County, and Municipal Employees. Former Indianapolis Mayor Steven Goldsmith is noted for his successful collaboration with city union leaders and has written about the lessons he took away from that experience and similar situations. Former President Clinton established labor-management councils in Federal departments and IRS Commissioner Charles Rossotti used the 1998 IRS reform legislation to forge a constructive labor-management relationship at the IRS. Observers of labor-management practices at the U.S. Postal Service believe that both relations and productivity at the department have been enhanced by the management's inclusive approach to working with its unionized employees.

The common characteristic of these examples is that they were mutual efforts that went the extra mile to enhance communication and consensus. They may pro-

<sup>6</sup>Tim Kauffman, "DOD Personnel Plan Under Fire from Lawmakers, Unions," Federal Times, March 8, 2004.

vide some models that will enhance the Department's ability to successfully implement the NSPS.

In the end, it is important that there be a common commitment to the goals of the NSPS: a highly-engaged, well-qualified workforce, working in concert with DOD leadership to achieve the Department's important public mission.

#### LOOKING AHEAD

Employee representatives have expressed concern that many additional details of the new system are undefined. The question is how to balance DOD's desire to retain flexibility in implementing the new system so that improvements can be made as it becomes operational, with the employees' interest in participating in system elements that will have a significant impact on their employment. One answer is for the DOD and OPM to continue to collaborate with stakeholders in the design of the pay for performance and other NSPS elements. As noted earlier, there is a consensus that ongoing, regularized communication and feedback among all stakeholders is critical to the successful operation of a performance-based pay system.

The adoption of a government-wide framework for personnel reform would help to address this issue for all Federal agencies, and for all stakeholders.

Paul Volcker and Comptroller General David Walker co-hosted a forum a year ago to explore this concept.<sup>7</sup> The consensus of the participants—a broad group representing employees at all levels, policymakers, academics and nonprofit organizations—was that such a framework should be established. As discussed at the forum, the framework should include values, principles, and processes that must underlie all Federal personnel systems. For example, the framework could specify the processes that Congress believed should be part of all Federal performance management systems. The Academy is continuing to work on this concept, including a project to validate a model framework developed by a working group.

Finally, one point repeatedly stressed by the members of the Volcker Commission was the critical importance of congressional oversight. This hearing is just what they believed would be necessary and I am sure they would strongly encourage the committee to continue to play an ongoing and close oversight role.

#### CONCLUSION

Implementation of these new systems necessarily goes hand in hand with a maturing of the view of the Federal workforce and the relationship among front-line workers, managers, executives and political leadership. As one Academy study puts it:

Paternalistic cultures are giving way to values that reflect greater equality and adult relationships in the workplace. These changes require employees to take more responsibility for their own competence, performance, and development. Meanwhile, executives and managers at all levels must take responsibility for providing challenging work opportunities and creating a culture for learning, teamwork, and accountability for results.<sup>8</sup>

This change is challenging but is full of opportunity. It is widely recognized as being necessary for the Federal Government to meet its 21st century responsibilities.

Chairman WARNER. Thank you very much. I can assure you that this committee will do just that. Let me go back to my simple analogy, it's a team between uniform and civilian forces in the DOD, and we have equal responsibility here to fulfill. I see my colleague—I intend to stay for a while, if you would like to ask your questions and I'll follow with mine.

Senator AKAKA. Thank you, Mr. Chairman. I want to thank our witnesses for your testimony, your comments on the NSPS. Because I know he's genuinely concerned, I'm so pleased that Secretary England has remained to hear the views of the second panel.

<sup>7</sup>Human Capital: Principles, Criteria and Processes for Government-wide Federal Human Capital Reform, U.S. Government Accountability Office and the National Commission on the Public Service Implementation Initiative, November 2004, GAO-05-69SP.

<sup>8</sup>Summary of Human Resources Management Research by the National Academy of Public Administration, Center for Human Resources Management, for the National Commission on the Public Service, July 2002.

Mr. Gage, as author of legislation strengthening the protections of Federal whistleblowers, I believe it is essential that all Federal employees feel comfortable coming forward to disclose government waste, fraud, and abuse. DOD and OPM have stated repeatedly and again today that the DOD civilian workforce will continue to have whistleblower protection under NSPS. However, I have heard from employees who question whether they will retain full whistleblower rights. Mr. Gage, do you believe whistleblowers are adequately protected under NSPS?

Mr. GAGE. No, Senator, I don't. I want to thank you for your involvement over the years in this important issue. But when you weaken the grievance procedure, when you weaken employee appeals, one of the big problems with whistleblowing is the reprisal that comes after you blow the whistle. When you weaken employee avenues of appeal, especially a strong grievance procedure and arbitration, I think that hurts whistleblower protection.

Senator AKAKA. Ms. Sistare, I was privileged to testify before the Volcker Commission in 2002, and I appreciate all the Commission has done on the issue of human capital reform.

You noted in your written testimony that the Volcker Commission's recommendations to improve labor/management relations in particular, the need for employee involvement in the development of any new personnel system like NSPS, based on the Commission's recommendations and your work at NAPA, do you believe the process laid out by DOD adequately involves employees and unions?

Ms. SISTARE. As I noted in my oral testimony and in my written testimony, I think that further steps could be taken. I think it's not just a matter of whether the letter of the law was followed, but that people feel that the spirit of the law is followed. Also, employees need to feel that Department management and the people putting the system together have taken the extra step. I think that will make a big difference how they feel when they actually go into implementing the new system.

Senator AKAKA. Mr. Stewart, the GAO has reported that DOD does not have comprehensive strategic workforce plans to guide its human capital efforts, and noted that without such plans, DOD will be unable to design effective strategies to hire, develop, and retain a strong workforce. Given the absence of a comprehensive workforce plan, how well do you believe NSPS will address DOD's workforce needs?

Mr. STEWART. Thank you for the question, Senator Akaka. You're absolutely right. We issued a report less than a year ago that was less than complimentary of the Department's strategic workforce planning. I guess the most egregious or troubling situation that we found was that in looking at the DOD components that employed at least 85 percent of all of the civilian workforce, not one component had developed core competencies.

We asked the question, have you identified current and future competencies, and the answer was no across the board. I might correct myself with the exception of the Marine Corps. The Marine Corps had developed competencies.

This is a critical issue because this is the way that we communicate to employees what is expected of them in terms of their per-

formance. DOD, in the proposed regulations, actually allows for performance expectations but does not specify the form which that will take. We are encouraging the DOD to consider core competencies, because competencies are a set behavior that includes knowledge, skills, and abilities that are critical in getting the work done.

With the competencies brings uniformity and it's clear and understandable what is expected. So without the competencies, we have questions about how effective the NSPS will be in terms of aligning performance, employee performance with the overall mission and how that's communicated and how effective that's going to be.

Senator AKAKA. Thank you very much for your responses. Mr. Chairman, I have questions that I'll submit for the record.

Chairman WARNER. Senator, I'd like to advise our witnesses and those in attendance that yesterday you and I as members of the Committee on Homeland Security and Government Affairs adopted a markup bill which goes to the floor.

Part of that bill contains your contribution in the area of whistleblowers. On the assumption that hopefully that will become eventually a legislative package, should not we ask our witnesses to take cognizance of what that additional thinking of protections toward this was currently and hopefully to be passed by the Senate and then go on to the House until it becomes legislation. But it seems to me that's a process that should be following. Would you agree with me on that?

Senator AKAKA. Yes. Mr. Chairman, we have been very concerned about the workforce and would like to be able to work together in reaching agreements, even compromises in some of the concerns that we have on both sides.

I know there is an effort to try to set up a strategic kind of planning by DOD and for NSPS, but we want it to be done in such a way that there is an agreement and compromise, so that the workforce can be at its optimum in working for our country. Mr. Chairman, this is a whole new thing and I hope it can continue, these efforts.

Chairman WARNER. Thank you very much, Senator. I originally intended to ask a question of each of you about the procedures that have been followed quite apart from the merits or the demerits of the legislation and so forth. But I understand that that's a matter now in the Federal courts, so we will not ask you about procedures but this committee will follow that case with great interest.

First to you, Mr. Stewart, in your prepared testimony, you state that the DOD's proposed regulations indicate that, and I quote "nothing in the continuing collaborative process with employees will affect the right of the Secretary of Defense to determine the content of implementing guidance and to make this guidance effective at any time."

Do you believe that the Department has gone too far?

Mr. STEWART. It certainly is a different model from some of the other agencies. I really don't have a good answer for that, Mr. Chairman.

Chairman WARNER. You can take that for the record.



Mr. STEWART. The concern, Mr. Chairman, is that the Secretary, the regulations would give the Secretary that authority. But the question is how would that be used. So since that hasn't played out yet, it's pretty difficult to answer the question is that too much, has that gone too far. I think it depends, I think it depends on how that authority would be used.

Chairman WARNER. The second part of the question was, we would like to have the recommendations that you might have on the involvement of employees in the content of implementing—

Mr. STEWART. The involvement of employees in implementing?

Chairman WARNER. The issuances?

Mr. STEWART. Yes.

Chairman WARNER. Thank you. Now, for Mr. Gage, your concerns that the composition of the NSLRB as proposed are understandable. The Secretary of Defense would appoint all members without any requirement or input from employees. Do you have a recommendation on how the proposed board should be modified, constituted to ensure its independence and also to ensure that in addition to understanding DOD's mission, it also understands DOD employees?

Mr. GAGE. I think the union should be able to recommend—strongly recommend a member, a membership on the board. I think that the fairer that the appointments of this board are, the more credibility employees will have in the fairness of the decisions of the board. If it's just a kangaroo court, we are going to know it very quickly. I think starting out by having a fair board with a composition that is made by DOD management, as well as employee representatives, I think that is the best way to assure that. Also, of course, to put a term on it.

Chairman WARNER. I can't imagine there is any legal impediment to your making a recommendation. You can certainly forward them to the Secretary, could you not?

Mr. GAGE. Did you have his address for me, Senator, that I could talk to him?

Chairman WARNER. I think that knowing the Secretary of Defense, Mr. Rumsfeld, and indeed knowing the distinguished Secretary of the Navy, these are men of reasonable mind and I'm certain that if you were to forward recommendations, they would review them.

Mr. GAGE. Senator, this is an institutional thing, though. It's not just asking him to appoint someone in his mind that is fair, it's someone who has to be perceived as fair and having our weight behind him, too, to make the institution of this board fair.

So I understand what you are saying about reasonable people, this is going to be around a long time and I think it's just so important that the initial constitution of this board and that it be constituted in the future with meaningful employee participation.

Chairman WARNER. Thank you very much. Ms. Sistare, if I might ask of you, in your testimony, you indicate that former Indianapolis Mayor Steven Goldsmith has written from lessons he took away from collaboration with union leaders. Are there any examples from that experience that you can share with the committee and from which the Department and unions would benefit?

Ms. SISTARE. Yes. I would be glad to. Then Mayor Goldsmith has written about the process that he used to right a very bad labor/management relation system that existed when he took office. He did two particularly important things at the beginning.

One, he worked with the employees to identify the problem. They had a common problem, which was that the city was nearly broke, was losing a tax base, and was losing population. Then working together they identified a common mission, which was to make the city economically viable, to keep people from leaving, to have clean streets, and give people the services they needed.

He got to know the city workers by literally working with them at their jobs. Through this process, he found out what they were thinking about. But not just grievances. What he found out was what it took to make their job work, what kind of equipment worked better, what kind of supplies worked better. This gave him a real firsthand knowledge of what was going on and he built on that.

He said it was not easy. It took over 2 years to really get it right but at the end of that time, they had instituted performance management. Then over time, the city budget had a surplus. They were able to give raises. They didn't fire any of the unionized employees. It seems to be a very positive example of what was done in at least one place.

Chairman WARNER. Had you contemplated making recommendations of nominees for the NSLRB?

Ms. SISTARE. What I suggested in my written testimony was that a merit system be established to pick them, and that the procedures that they follow be set out clearly.

The Department would like these participants, members of the board, to weigh the Department's needs. I think it should spell out how the Department's need is and isn't really affected and where an employee's well-being really is, and maybe there should be one standard. So people know in advance. I think I would be reticent to suggest that any of these people actually represent someone, that they represent either management or labor. I'd rather see that they be independent.

Chairman WARNER. Mr. Stewart.

Mr. STEWART. Mr. Chairman, as I noted in my oral comment, it's not just that the Secretary can appoint the board members, it's that he can also remove them. If that were not true, perhaps it would be okay if he could appoint the members.

But there is a question of independence when an individual can be removed by the same person who appoints them. At the GAO, we have a personnel appeals board, and the Comptroller General has the authority to appoint the five members to that board. But he does not have the authority to remove any one member from that board. That is, that's an internal board process. But he does not have that authority. So that would be the caveat that I would offer for consideration.

Chairman WARNER. Thank you. We will follow the manner in which this board is constituted very carefully. I don't know that it will require further legislation. But we will indeed take to heart the observations that each of you made about the importance of it. We will submit additional questions to you, in hopes that you can

respond in a timely way. Thank you for your contribution. We have had an excellent hearing today. Thank you very much.

The hearing is adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JAMES M. INHOFE

IMPLEMENTATION OF THE NATIONAL SECURITY PERSONNEL SYSTEM

1. Senator INHOFE. Secretary England, I'd like for you to share what you discussed with me yesterday, regarding your implementation plan or philosophy regarding the National Security Personnel System (NSPS).

Secretary ENGLAND. Senator Inhofe, I assured you that I would keep a close watch on what was occurring during the meet and confer process. I committed to you that I will ensure we take whatever time is necessary to analyze and address issues raised by the unions on behalf of our employees during this process.

2. Senator INHOFE. Mr. Blair, I would like to hear from you on any significant implementation changes and what challenges there may be with implementation of this new system.

Mr. BLAIR. We are working hard to ensure that the current timetable moves the Department of Defense (DOD) forward at a pace that will enable the Department to make appropriate adjustments in the event of any unforeseen difficulties. I view the most significant implementation challenge as maintaining effective lines of communication with the DOD workforce. Effective and continuous communication across the Department will help ensure that employees are aware, knowledgeable, and current on the significant changes taking place with the NSPS.

We want to ensure DOD is well positioned to begin implementation. Evidence of this can be found in its plans to implement in phases or "spirals."

3. Senator INHOFE. Secretary England, how much different is the system being implemented at the DOD from the one implemented at the Department of Homeland Security (DHS)? From that implementation, what do you see as the areas of concern for DOD?

Secretary ENGLAND. The Department benefited greatly from the efforts of DHS when developing the proposed NSPS regulations. The DHS regulations were analyzed by staff-level working groups, as well as senior leadership, and where it made sense and was consistent with and supported DOD's national security mission, operations, and statutory authorities, we adopted many of the concepts and approaches, and even much of the specific language set forth in the DHS regulations. At the same time, where there were differences, such as in terms of scope, mission, organizational culture, and human capital challenges, as well as the statutes that authorize the respective HR systems—DOD and Office of Personnel Management (OPM) have broken new ground, and these proposed regulations are intended to stand on their own in that regard. Accordingly, this proposed regulation should not be viewed (or judged) in comparison to DHS, but rather as an independent effort, informed by the DHS experience, yet focused on DOD's mission and requirements.

The primary statutory differences are:

- NSPS law authorizes changes to staffing and reduction in force policies; DHS has no such authority.
- NSPS law provides for waiver of premium pay provisions of title 5; DHS does not authorize such a waiver.
- NSPS law sets requirements for NSPS, to include a pay for performance evaluation system, then links coverage of adverse actions and appeals flexibilities to only those organizations under NSPS. DHS does not have this limitation.
- NSPS law entitles employees to adverse action appeal rights to the full Merit System Protection Board (MSPB), under a limited standard of review; DHS does not have this requirement.
- NSPS labor relations provision does not authorize a waiver of 5 U.S.C. chapter 71; rather it allows the establishment of a new LR system notwithstanding chapter 71. DHS may waive chapter 71.
- NSPS labor relations authority expires on November 24, 2009, unless this authority is extended in law. DHS does not have an equivalent sunset provision.

## AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

4. Senator INHOFE. Mr. Stewart, Mr. Gage, and Ms. Sistare, please comment on each of the “flashpoints” that the AFGE has raised through Mr. Gage’s written statement:

“DOD has proposed radically reducing the scope of collective bargaining in the proposed regulations. . . . The proposed regulations do not follow the law with respect to its instructions to maintain collective bargaining rights for affected DOD employees.”

Mr. STEWART. Our previous work on individual agencies’ human capital systems has not directly addressed the scope of specific issues that should or should not be subject to collective bargaining and negotiations.

Mr. GAGE. Public Law 108–136 protects the right of employees to organize, bargain collectively, and to participate through a labor organization of their own choosing in decisions that affect them. When the National Defense Authorization Act (NDAA) was enacted in November 2003, the DOD was authorized to modify the personnel system, but was prohibited by Congress from instituting any new procedures that could eliminate fundamental labor rights. In hearings that preceded the passage of the NDAA, DOD officials repeatedly stated that they were not trying to eliminate collective bargaining rights. In fact, Defense Secretary Rumsfeld assured Congress that the proposed regulations would adhere to the law with respect to its instruction to maintain collective bargaining rights for affected DOD employees, and that his only intent with regard to collective bargaining was to establish national-level bargaining. A majority of House and Senate members voted for this bill based upon the false assurance that these fundamental labor rights would be protected. Unfortunately, the NSPS does not adhere to the law with regard to its instruction to maintain collective bargaining rights for affected DOD employees, and goes clearly beyond what Congress intended.

Ms. SISTARE. The first relates to the scope of collective bargaining in the proposed regulations and includes Mr. Gage’s assertion that the proposed regulations do not follow the law with respect to its instructions to maintain collective bargaining rights for affected DOD employees. Regrettably, the matter of the proposed regulations compliance with the law—unless the regulations are altered to the AFGE’s satisfaction in the final regulations will be decided through the judicial process. This is regrettable, as are other instances where design of the new system will be determined in the courts, rather than through the policymaking process. By its nature, the policymaking process produces consensus and buy in, both of which I believe are very important to the successful implementation of this new personnel system.

5. Senator INHOFE.

“The board that hears labor-management disputes arising from NSPS must be independent of DOD management. . . . In the proposed NSPS regulations, DOD would establish an internal board made up entirely of individuals appointed by the Secretary.”

Mr. STEWART. In our previous testimonies on the proposed and final DHS regulations, we stressed the importance of the actual and perceived independence and impartiality of such boards.<sup>1</sup> Members of these types of boards should be, and appear to be, free from interference in the legitimate performance of their duties and should adjudicate cases in an impartial manner, free from initial bias and conflicts of interest.

Consistent with fostering board independence and impartiality, DOD’s proposed NSPS regulations provide for staggered-term appointments for members of the proposed National Security Labor Relations Board (NSLRB) and place some limited conditions on the removal of a member. For example, members of the board would be appointed for terms of 3 years, except that the appointments of the initial board members will be for terms of 1, 2, and 3 years. The Secretary of Defense may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for up to two additional 1-year terms. DOD could further enhance the independence and impartiality of the board through the appointment and removal process of Board members. This could include such areas as: (1) a nomination panel that reflects input from appropriate parties and a reasonable degree of balance among differing views and interests in the composition of the

<sup>1</sup> GAO, Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations, GAO–04–479T (Washington, DC: Feb. 25, 2004) and Human Capital: Preliminary Observations on Final Department of Homeland Security Human Capital Regulations, GAO–05–320T (Washington, DC: Feb. 10, 2005).

board to ensure credibility, and (2) appropriate notification to interested parties in the event that a board member is removed.

The proposed regulations allow the Secretary of Defense to appoint and remove individual board members; however, this raises the question of the independence of the board. If the proposed regulations were modified to allow the Secretary of Defense to appoint but not remove members, then this may help the credibility and independence of the board.

Mr. GAGE. In the proposed NSPS regulations, DOD would establish an internal board made up entirely of individuals appointed by the Secretary. Such a board would have no independence from management and would therefore lead to unfair favoritism when hearing employee appeals. Although DOD promises that the NSLRB would operate with independence and autonomy within the Department, a body appointed entirely by the employer is not a neutral third party, for either labor relations or employee appeals. In order to create a more impartial NSLRB we recommend creating a body that is entirely separate and distinct from DOD management. We recommend that the three-member board consist of one union member, one management official, and one member jointly selected by two appointees of the union and the employer. Although creating the NSLRB is unnecessary because it duplicates the function of the already existing Federal Labor Relations Board, if the NSLRB is designed in this manner it will create a more balanced and less employer centered forum to resolve grievances.

Ms. SISTARE. The second relates to the fact that the proposed regulations establish "an internal board made up entirely of individuals appointed by the Secretary" and thus, in the view of the AFGE, not appropriately independent of DOD management. I agree that the creation of an internal board can lead to the view that its decisions will not be fair. As I noted in my written and oral testimony—the perception of fairness matters very much in any appeals system. I urged that criteria be established in advance, perhaps as part of the final regulations, providing for the merit selection of the members of the internal review board.

#### 6. Senator INHOFE.

"The standard for mitigation by the MSPB of discipline and penalties imposed on employees under NSPS in the proposed regulations is virtually impossible to meet and effectively removes the possibility of mitigation."

Mr. STEWART. The U.S. Merit Systems Protection Board will not know the actual impact until a number of cases are adjudicated.

Mr. GAGE. Under the new appeals system, MSPB will not be able to mitigate a performance-based adverse action unless the action taken by the manager against an employee is deemed "wholly unjustified." This standard is far too high, and undermines the standard that the judicial system established over 25 years ago, stating that employees must only show that the actions are "unreasonable." The new standard essentially takes away the employee's right to have any meaningful opportunity to have adverse actions mitigated by the MSPB. There is simply no justification for eliminating an adjudicative process for employee appeals that has fairly resolved employee-employer disputes for so many years. The Department's decision to eliminate this process is a blatant attack on the employee's right to fair representation.

Ms. SISTARE. The third relates to Mr. Gage's comment that "the standard for mitigation by the Merit System Protection Board of discipline and penalties imposed on employees under MSPB in the proposed regulations is virtually impossible to meet and effectively removes the possibility of mitigation." The standard is definitely high, though, in my view not "impossible" to met. My own concern focuses on the first levels of the appeals process, which I believe are more critical to the reality and belief that employees will be treated fairly. For example, I believe the selection of the review board members should be based on merit and that the standards they will apply—such as the specific offenses for which an employee may be automatically terminated and the means by which the Department's mission will be taken into consideration—should be spelled out clearly, in advance of implementation of the system.

#### 7. Senator INHOFE.

. . . "under the proposed regulations, not only is there no requirement for management to present written standards against which performance will be measured, but employees are also denied the right . . . to use negotiated grievance and arbitration system. . ."

Mr. STEWART. On the basis of our previous work, we believe that performance standards should be written. We also advocate the use of competencies—the skills,

knowledge, and abilities staff heed to accomplish the work. We have found that competencies can help reinforce employee behaviors and actions that support the Department's mission, goals, and values, and can provide a consistent message to employees about how they are expected to achieve results. These core competencies must be in writing to assure that managers, supervisors, and employees see and understand the criteria that will be used to manage and assess employee performance.

Regarding grievance and arbitration systems, during testimony in April 2005, we reaffirmed our position that there should be both informal and formal appeal mechanisms within and outside of the organization if individuals feel that there has been abuse or a violation of the policies, procedures, and protected rights of the individual. Internal mechanisms could include independent Human Capital Office and Office of Opportunity and Inclusiveness reviews that provide reasonable assurances that there would be consistency and nondiscrimination.<sup>2</sup> Furthermore, it is of critical importance that the external appeal process be independent, efficient, effective, and credible. As DOD's human resources management system efforts move forward, DOD will need to define, in more detail than is currently provided, how it plans to review such matters as the establishment and implementation of the performance appraisal system—and, subsequently, performance rating decisions, pay determinations, and promotion actions—before these actions are finalized to ensure they are merit based.

Mr. GAGE. Under NSPS, performance appraisals will be the crucial determinant of salary, salary adjustment, and job security for Federal employees. If management officials are not required to base salary increases and adjustments on some transparent and concrete standard, there will be no means to determine if these increases and adjustments, or lack thereof, are fair or credible. Under the proposed NSPS, adverse action arbitrations will no longer be final and binding either. Reducing the role of arbitrators is not only contrary to congressional intent, but takes away the employee's option to use negotiated grievance and arbitration systems to present evidence that their performance appraisals are inaccurate. Supervisors can use their own arbitrary and subjective standards to monetarily award or punish Federal employees and these employees, in turn, have no means to contest these inequities because they ultimately have no recourse to the law. If DOD insists on compensating and awarding employees on an individualized basis, the agency must verify that remuneration is based on an objective and non-discriminatory criteria.

Ms. SISTARE. The fourth relates to the concern that under the proposed regulations there is no requirement for management to present written standards against which performance will be measured and that these matters are not subject to negotiation. I believe that the standards set out by the GAO for an effective performance based pay system—which are mirrored in the work of the National Commission on the Public Service (Volcker Commission) and study panels of the National Academy of Public Administration—should be the guiding light for the design and implementation of the system at DOD. These include a clear understanding by all involved, following education, training, and communication, of how the goals of the agency relate to the measures of employee performance and how those measures will be applied.

#### 8. Senator INHOFE.

“Strong and unambiguous safeguards must be in place to prevent a general lowering of pay for DOD civilian workforce. The proposed regulations permit a general reduction in salaries for all DOD personnel compared to rates they would have been paid under statutory systems.”

Mr. STEWART. Under the proposed regulations, DOD could not reduce employees' basic rates of pay when converting to pay bands. However, employees' compensation may increase at a rate higher or lower than under the current compensation system because under NSPS compensation is designed to be: (1) market sensitive, with consideration of local market conditions to set pay rates; and (2) performance based.

Mr. GAGE. Under the NSPS regulations, each agency head has the ability to reduce entry level salaries, and an ability to refuse annual adjustment of salaries for those who perform satisfactorily. Unlike the NSPS system, the GS system and the pay adjustment process described in FEPCA were established upon the principles of market adjustments. Base salaries reflect job duties, and salary changes reflect changes in the ECI and other market data from 1 year to the next. Under the NSPS system, however, employees are paid according to the whim of their superiors. Without a uniform system to promote workers fairly, employees are often left feeling

<sup>2</sup> GAO, Human Capital: Preliminary Observations on Proposed Department of Defense National Security Personnel System Regulations, GAO-05-517T (Washington, DC: Apr. 12, 2005).

cheated and some of them will have objective evidence of having been cheated. Safeguards must therefore be established not only to protect the living standards of the civilian DOD workforce relative to the rest of the Federal workforce and the labor market, but also to guarantee the ongoing economic vitality of communities within DOD installations.

Ms. SISTARE. The fifth relates to the concern that the performance based pay system under NSPS will result in a general lowering of pay for DOD civilian employees. As articulated by the National Commission on the Public Service, the purpose of performance based pay should be to reward and encourage performance, not to save money. It may in fact cost more to implement a performance based pay system—certainly there are start up costs for training and other development and implementation activities which will involve additional costs. Adequate funding to allow the agency to make meaningful distinctions in pay is very important.

9. Senator INHOFE.

“Procedures for deciding who will be affected by a reduction in force must be based on more than a worker’s most recent performance appraisal. The proposed NSPS regulation would allow an employee with 1 year of service and an outstanding rating to have superior retention rights to an employee with 30 years of outstanding appraisals and 1 year of having been rated merely “above average.”

Mr. STEWART. Under DOD’s proposed regulations, greater emphasis will be given to job performance in the reduction-in-force process by placing performance ahead of length of service. Under the proposed regulations, employees will be placed on a competitive group’s retention list in the following order of precedence: (1) tenure group, (2) veterans’ preference, (3) individual performance rating, and (4) length of service. DOD may also establish a minimum reduction-in-force competitive area on the basis of one or more of the following factors: geographic location(s), line(s) of business, product line(s), organizational unit(s), and funding line(s). The proposed regulations provide DOD with the flexibility to define competitive groups on the basis of career group, pay schedule, occupational series or specialty, pay band, and/or trainee status.

Mr. GAGE. We are strongly opposed to such a stringent and blithe methodology for determining retention status in the context of Reductions in Force (RIF), as it undermines the longstanding veterans’ preference rule, as well as seniority. The method that is currently used to determine RIFs is fair and reasonable because it takes into account the many factors that should be considered when evaluating an employee’s contribution to the Department and the Department’s mission. Under the new proposals, veterans and other employees that have proven their commitment and loyalty to the government through longevity and/or service will be discounted based on one unaccountable performance appraisal. This methodology is indefensible and dangerous, as it essentially opens the door to arbitrarily eliminating employees based on personal preferences rather than eliminating employees based on the record.

Ms. SISTARE. The sixth relates to the issue of whether RIF decisions should be based on an employee’s current performance rating, as opposed to their ratings over a period of time. I believe that retention, like pay, should be based on performance rather than longevity. My own view is that it would make sense to consider an employee’s level of performance over time, rather than base it on one specific year, no matter how recent.

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QUESTIONS SUBMITTED BY SENATOR EDWARD M. KENNEDY

COLLECTIVE BARGAINING PROCEDURES

10. Senator KENNEDY. Secretary England, please explain what steps you will take to ensure that the final regulation is revised to meet the requirements of the statute regarding collective bargaining.

Secretary ENGLAND. While some may disagree with the proposed regulations, the proposed regulations are consistent with the requirements of the statute regarding collective bargaining. The proposed regulations attempt to strike a balance between employee interests and DOD’s need to accomplish its mission effectively and expeditiously. For example, while the proposed regulations eliminate bargaining on procedures regarding operational management rights, it does not eliminate all bargaining on procedures. The regulations continue to provide for bargaining on procedures for personnel management rights. The proposed regulations also continue to provide for bargaining on impact and appropriate arrangements for all management rights. Fi-

nally, the proposed regulations provide for consultation on procedures regarding the operational management rights, which lie at the very core of how DOD carries out its mission.

11. Senator KENNEDY. Secretary England, please explain your plans to ensure that the NSPS does not severely restrict the scope of issues that can be bargained.

Secretary ENGLAND. The proposed regulations are consistent with the requirements of the statute regarding collective bargaining. The proposed regulations attempt to strike a balance between employee interests and DOD's need to accomplish its mission effectively and expeditiously. While the scope of bargaining is restricted compared to what occurs today, the proposed regulations continue to provide many opportunities for the unions to have a voice in workplace issues.

#### LABOR-MANAGEMENT DISPUTES

12. Senator KENNEDY. Secretary England, how can employees and their representatives expect a fair review when management has absorbed all of the power and board members serve at the whim of the Secretary?

Secretary ENGLAND. While the Secretary will establish the NSLRB, safeguards are established in the proposed regulations to ensure that the NSLRB operates with independence. The members are appointed to fixed terms of 3 years, and can be extended for two additional 1-year appointments. Members will be independent, distinguished citizens known for their integrity, impartiality, and expertise in labor relations and/or the DOD mission, and/or relevant national security matters. The members are subject to the same stringent criteria for removing members of the Federal Labor Relations Authority (FLRA) and Merit Systems Protection Board, i.e. inefficiency, neglect of duty, or malfeasance. Finally, all decisions of the NSLRB are reviewable by the FLRA and the Federal circuit courts of appeals. All of these safeguards ensure that a fair review of labor disputes will be made by the NSLRB without undue influence by the Secretary or DOD management.

13. Senator KENNEDY. Secretary England, how do you justify this policy that is so clearly biased against workers?

Secretary ENGLAND. This policy is not biased against workers. The DOD civilian workforce plays a critical role in the successful accomplishment of the Department's national security mission. In authorizing the creation of the NSPS, Congress recognized that maintaining the status quo with respect to labor-management relations would not provide DOD with a workforce that is sufficiently agile and flexible to execute the current and future national security mission. The regulations continue to ensure the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them. In proposing these changes, the Department is attempting to strike a balance between employee interests and DOD's need to accomplish its mission effectively and expeditiously.

#### NATICK SOLDIER CENTER'S DEMONSTRATION PROPOSAL

14. Senator KENNEDY. Secretary England, please explain what steps you will take to ensure that the demonstration proposal is approved.

Secretary ENGLAND. The Office of the Secretary of Defense Personnel and Readiness (OSD/P&R) is working with the Army to determine if Natick is or is not covered by the NSPS. If Natick could be moved under NSPS human resource (HR) provisions before 2008, we will advise you.

15. Senator KENNEDY. Secretary England, do you intend to include Natick in the NSPS human resources system before October 1, 2008, even though under the statute, its parent organization is specifically excluded?

Secretary ENGLAND. The OSD/P&R is working with the Army to determine if Natick is or is not covered by the NSPS. If Natick could be moved under NSPS HR provisions before 2008, we will advise you.

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#### QUESTIONS SUBMITTED BY SENATOR JOSEPH I. LIEBERMAN

##### CURTAILMENT OF COLLECTIVE BARGAINING

16. Senator LIEBERMAN. Secretary England and Mr. Blair, it is my understanding that the proposed regulations would allow managers with Department-wide author-



ity, or with authority for any constituent component of the Department, to prohibit collective bargaining on any subject simply by issuing a policy or other kind of directive dealing with the subject. I have heard concerns expressed that this authority could even be used to invalidate provisions of collective bargaining agreements that the managers do not want to comply with. Is my understanding correct? If it is so, and if one party to the negotiation can unilaterally take any or all subjects off the table, I do not see how collective bargaining can achieve its intended purpose of enabling the amicable and productive resolution of disagreements.

Secretary ENGLAND. Your understanding is not correct. Only the Secretary of Defense, the Deputy Secretary of Defense, the Principal Staff Assistants (e.g. Under Secretaries), and the Secretaries of the Military Departments will issue NSPS implementing issuances that override provisions of collective bargaining agreements. This ensures that the Department is able to implement a uniform and consistent personnel system and emphasizes that only the highest level officials in the Department would have the authority to impact collective bargaining agreement provisions that conflict with NSPS implementing issuances. DOD and Military Department-level issuances that may impact collective bargaining agreements must be based on mission and business related reasons. Unions at the national level are provided an opportunity through continuing collaboration to be involved in NSPS implementing issuances that will supersede a conflicting collective bargaining agreement provision(s). We believe this is consistent with the underlying NSPS statute.

Mr. BLAIR. The proposed regulations do not give managers unfettered authority to issue a policy for the purpose of prohibiting bargaining or invalidating provisions of a collective bargaining agreement that they do not like. There are two distinct types of issuances and each is treated differently with regard to union involvement in the proposed regulations. The first is what is referred to as an implementing issuance which would specifically carry out the provisions of the joint DOD/OPM NSPS regulations. As proposed, these issuances would supercede conflicting provisions of collective bargaining agreements to ensure consistent application of NSPS rules throughout the Department. However, the unions will have an opportunity to review and comment on implementing issuances before they are promulgated, as provided for in continuing collaboration procedures proposed in the regulations at 9901.106(a)(3)(i).

The second type of issuance as proposed in the draft regulation is a DOD issuance. These are issuances that do not carry out the provisions of NSPS regulations. DOD issuances do not immediately override conflicting provisions of existing collective bargaining agreements. However, upon expiration of a collective bargaining agreement, the conflicting provision would have to be brought into conformance with DOD or component issuances. Our interest in these provisions is to provide for consistent, standard application of DOD and component policies, instructions, and procedures. This manner of dealing with conflicting provisions is in fact the same approach that exists today with regard to governmentwide regulations.

In this respect, bargaining would occur over a wide variety of issues related to any policy prescribed in an issuance to the extent otherwise negotiable and not in conflict with the issuance. For example, the Department might promulgate an issuance regarding certain information required on all vacancy announcements. Issues related to this policy that may be subject to bargaining might include the length of time an announcement was open, how the announcement was communicated to the workforce, posting a notice of available positions on bulletin boards, advance notice of the announcement to the union, provisions for sending announcements to employees activated for duty in the Reserves, provisions for notifying employees away from the worksite on training, etc.

As you can see, the proposed regulations strike a balance between the need for consistent policies and collective bargaining. In striking this balance, they do not give management unfettered authority to override provisions of collective bargaining agreements.

17. Senator LIEBERMAN. Secretary England and Mr. Blair, similarly, if one side has the power to invalidate any or all provisions of an agreement at will, I don't understand how collective bargaining agreements can serve their intended purpose of establishing a reliable framework for governing relationships between employees and managers. Is my understanding correct?

Secretary ENGLAND. Your understanding is not correct. An issuance will not be for the sole purpose of overriding a collective bargaining agreement. While DOD and military department-level issuances may impact collective bargaining agreements, there will be mission and business related reasons for these issuances. Finally, there are many issues that occur locally that are not governed or specifically covered by

a DOD-level or military department-level issuance. These matters continue to be covered by collective bargaining agreements.

Mr. BLAIR. As stated above, the proposed regulations do not give management unfettered authority to override collective bargaining agreements. In addition, should management attempt to exceed its authority in this regard, the proposed regulations provide the unions with the ability to seek enforcement of these regulatory requirements with the National Security Labor Relations Board, with review by the Federal Labor Relations Authority, and ultimately the courts. Finally, there are many issues that occur locally that are not governed or specifically covered by a DOD- or component-level issuance. They would continue to be covered by collective bargaining agreements.

#### LACK OF SPECIFIC ELEMENTS IN PERFORMANCE-MANAGEMENT SYSTEM

18. Senator LIEBERMAN. Secretary England and Mr. Blair, my impression of the proposed pay and performance regulations is that they are skeletal outlines of a program, but leave the specific policies and procedures for subsequent development. For example, the statute requires that any regulations must incorporate specific elements to ensure fairness and guard against politicization and other abuse in performance management. These must include, among other things, in the words of the statute—"a fair, credible, and transparent employee performance appraisal system," "a means for ensuring employee involvement in the design and implementation of the system," and "effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance." The proposed rules do restate these requirements and say that they must be met. But I did not see specific policies or procedures that would actually show how these requirements will be accomplished. Doesn't the governing law require that these and other statutory elements be described in enough detail in published proposed regulations, issued jointly by DOD and OPM, that employees, Congress, and the public can evaluate these proposed elements of the system and engage with DOD and OPM about any concerns?

Secretary ENGLAND. The Department's implementing issuances will provide much more detail on the pay and performance systems. As provided in the proposed regulations, employee representatives will participate in the development of these implementing issuances through the continuing collaboration process. Under continuing collaboration, unions will have the opportunity to review proposals, submit comments, and at the discretion of the Secretary, to meet and discuss their views.

Mr. BLAIR. I agree that some aspects of these regulations are relatively general in nature, providing broad policy parameters but leaving much of the details to implementing directives. We believe that this structure, patterned after the chapters in title 5 that they replace, is appropriate. By providing for detailed implementing directives, the regulations provide the Department with the flexibility mandated by Congress, and they do so without compromising the Department's commitment to substantive employee representative involvement in the development of those directives.

#### TRAINING

19. Senator LIEBERMAN. Secretary England and Mr. Blair, in his testimony, Mr. Stewart of GAO recommends that DOD should complete a plan for implementing NSPS that includes training for both supervisors and employees. What planning have you done in developing a training program to support the NSPS?

Secretary ENGLAND. DOD recognizes that training for all our employees on the behavioral and functional aspects of NSPS is key to the success of NSPS. The NSPS training plan is a comprehensive, well-planned learning strategy to prepare the DOD workforce for transition to NSPS. The plan is grounded in the belief that participants need to be informed and educated about NSPS and trust and value it as a system that fosters accountability, respects the individual, and protects his and her rights under the law. The plan incorporates a blended learning approach featuring Web-based and classroom instruction supplemented by a variety of learning products, informational materials, and workshops to effectively reach intended audiences with engaging, accurate, and timely content. All employees will be provided training that covers the basics of the NSPS human resources management system including information on career groups, the pay band structure, as well as appeals procedures. A course on the performance management system will train employees on how a performance-based system operates and help them understand their roles and responsibilities. We estimate the employee training will take approximately a

day and a half or 12 hours. Supervisors and managers will receive additional training so they can fairly manage, appraise, and rate employees. This training is expected to take a minimum of 18 hours and will include both web-based and classroom training.

Mr. BLAIR. OPM defers to DOD on this question.

20. Senator LIEBERMAN. Secretary England and Mr. Blair, how much will the Department need to spend in order to train supervisors to evaluate employees properly?

Secretary ENGLAND. The Department's Program Executive Office (PEO) allocated \$2 million in fiscal year 2005 and plans to allocate another \$3 million in fiscal year 2006 to fund development of core NSPS training modules and deliver "train-the-trainer" sessions.

The Office of the Secretary of Defense (OSD), the military departments, and the defense agencies will fund the delivery of training to their personnel. Funds for fiscal years 2005 and 2006 do not currently have visibility as a discrete line item in their budgets. However, the military departments and defense agencies recognize the high priority of NSPS training, and are committed to funding delivery of that training within existing resources.

Mr. BLAIR. OPM defers to DOD on this question.

#### PAY LEVELS

21. Senator LIEBERMAN. Secretary England and Mr. Blair, in moving away from pay levels defined in statute, what assurances can you give that limited appropriations or other budget pressures will not result in pay levels too low to truly pay for performance?

Secretary ENGLAND. The Department views this as a basic covenant issue with its employees. The need to protect pay pool money must be balanced against the need for fiscal flexibility. The Department is taking concrete steps to ensure achievement of the NSPS key performance parameter to have a credible and trusted system. The Department is taking action to protect pay pool funding through its internal issuances. For example, the Department will mandate the minimum composition and expenditure of pay pool funds. In addition, the Department will require certification of the allocation and expenditure of those pay pool funds by an appropriate senior official. Finally, the Department will determine the appropriate mechanism(s) to ensure compliance.

Mr. BLAIR. Every agency must live within the appropriations Congress provides and, when appropriations are less than desired, must make choices among spending priorities. Nonetheless, we believe there is a strong incentive for DOD to pay its employees at competitive levels to avoid staffing problems. Furthermore, the NSPS legislation included a provision requiring DOD, to the maximum extent practicable, to allocate an aggregate amount for NSPS employee compensation in fiscal years 2004 through 2008 that is not less than the estimated aggregate amount that would have been allocated for such employees under existing pay systems. Beyond fiscal year 2008, DOD must provide a formula for determining the aggregate amount of NSPS employee compensation that ensures that "in the aggregate, employees are not disadvantaged" as a result of conversion to NSPS. (See 5 U.S.C. 9902(e) (4) and (5).) The proposed NSPS regulations restate these statutory requirements in § 9901.313.)

#### CIVILIAN PAY

22. Senator LIEBERMAN. Mr. Stewart and Ms. Sistare, John Gage in his testimony expressed concern that the NSPS will create downward pressure on DOD civilian pay. Are there mechanisms that you could suggest to assure that pay levels are adequate for employee recruitment and retention and to truly reward good performance?

Mr. STEWART. We have observed that a competitive compensation system can help organizations attract and retain a quality workforce.<sup>3</sup> To begin to develop such a system, organizations assess the skills and knowledge they need; compare compensation against other public, private, or nonprofit entities competing for the same talent in a given locality; and classify positions along levels of responsibility. While one size does not fit all, organizations generally structure their competitive compensation systems to separate base salary—which all employees receive—from other

<sup>3</sup> GAO, Additional Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations, GAO-04-617R (Washington, DC: Apr. 30, 2004).

special incentives, such as merit increases, performance awards, or bonuses, which are provided based on performance and contributions to organizational results.

We have reported that direct costs associated with salaries were one of the major cost drivers of implementing pay for performance systems, based on the data provided us by selected OPM demonstration projects.<sup>4</sup> We found that some of the demonstration projects intended to manage costs by providing a mix of one-time awards and permanent pay increases. Rewarding an employee's performance with an award instead of an equivalent increase to base pay can help contain salary costs in the long run because the agency only has to pay the amount of the award one time, rather than annually.

This practice is consistent with modern compensation systems, which typically include a mix of base pay increases plus other compensation incentives, such as one-time performance awards or bonuses. In developing pay for performance systems, agencies must consider what percentage of performance-based pay should be awarded as base pay increases versus one-time cash increases while still maintaining fiscally sustainable compensation systems that reward performance. In addition, to the costs associated with base pay increases, modern compensation systems typically consider an employee's salary in relation to a competitive range when determining the amount of performance pay that should be provided as a base pay adjustment versus a cash bonus amount. This base versus bonus concept differs from the largely longevity driven base pay adjustments provided to employees under the General Schedule. This new direction concerns employees, especially those who are close to retirement, who see these regular base pay increases as the foundation of future retirement benefits.

Ms. SISTARE. As recommended by the National Commission on the Public Service (Volcker Commission), the purpose of performance based pay should be to reward and encourage performance, not to save money. This view is consistent with the recommendations of panels of the National Academy of Public Administration and of the GAO. It is broadly recognized that it may well cost more to implement a performance based pay system—certainly there are start up costs for training and other development and implementation activities which will involve additional costs. Congress, through setting the annual overall budget for DOD civilian pay, will be able to assure that pay levels necessary to assure recruitment and retention and to truly distinguish between levels of performance are maintained.

#### COLLECTIVE BARGAINING

23. Senator LIEBERMAN. Mr. Gage, you have discussed ways in which the proposed NSPS rules would curtail collective bargaining. Could you explain the difference between how you negotiate over these issues under current law, compared with what you believe would occur under NSPS?

Mr. GAGE. NSPS would curtail collective bargaining because it would dramatically reduce the union's ability to bargain over matters that greatly affect Federal employees. NSPS essentially eviscerates the union's right to bargain but greatly expands the management right to make personnel changes without garnering the consent of the employees themselves. This provision takes previously negotiable issues "off the table," and permits DOD to unilaterally override provisions of collective bargaining agreements. The new regulations also eliminates a union's right to participate in formal discussions between bargaining unit employees and managers.

24. Senator LIEBERMAN. Mr. Gage, although the proposed rules would curtail collective bargaining, the rules provide for consultation between unions and the Department. What will be the impact of a shift from bargaining to consultation?

Mr. GAGE. As the law currently exists, management is required to come to the table to discuss certain mandatory subjects that are deemed to significantly affect the employee and his or her willingness to contribute in a positive way to the workforce and the Department's mission. This legal mandate is very important because without it, management could refuse to bargain on these issues at all if it were not required. Under the Department's proposal, DOD is required only to engage in perfunctory "consultation" with unions over personnel changes and can unilaterally decide which personnel changes are significant enough to be subject to collective bargaining. The clear intention of Congress was to protect employees' rights, and both labor and management's responsibility to bargain in good faith as described in chapter 71 of title 5. This newly created right to unilaterally supersede collective bar-

<sup>4</sup> GAO, Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects, GAO-04-83 (Washington, DC: Jan. 23, 2004).

gaining agreements is not consistent with Congress' intention that employers and employees bargain in good faith. Quite to the contrary, this new regulation eliminates the employees' ability to voice their concerns about their working conditions altogether.

#### URGENT NATIONAL SECURITY NEEDS

25. Senator LIEBERMAN. Mr. Gage, the Defense Department argues that the provisions in the proposed NSPS regulations are necessary to enable the Department to respond to urgent national security needs and to fulfill its mission. How would you respond to that argument?

Mr. GAGE. NSPS was allegedly created to enable the Department to respond to urgent national security needs and to fulfill its mission; however, nothing in the proposed NSPS regulations is perceptibly connected to "21st century threats." If the government seeks to address any national security threat it must do so with the support and cooperation of hardworking Federal employees. Yet, NSPS does not encourage cooperation, loyalty, or industriousness among employees, but rather fosters a cut-throat and divisive atmosphere where employees are more concerned about their own self-interest than the mission of the agency they serve. Employees who actually work under "pay for performance" systems generally feel cynical about their chances to excel in the workforce because their advancement is dependent upon their supervisor's arbitrary set of expectations and preferences. Yet, when employees have confidence in their employer and the stability of their incomes, they are willing to work hard and pull together for the sake of accomplishing a common mission. Clearly, NSPS takes this cooperative spirit out of the Federal workforce and therefore compromises, instead of bolsters, the Department's ability to respond to urgent national security needs.

#### SAFEGUARDS AGAINST ABUSE

26. Senator LIEBERMAN. Mr. Stewart, in your testimony you expressed concern that the proposed regulations do not contain adequate safeguards to help ensure fairness and guard against abuse. Could you elaborate on what kinds of safeguards you believe should be considered in this context?

Mr. STEWART. As we noted in our statement, although DOD's proposed regulations provide for some safeguards to ensure fairness and guard against abuse, additional safeguards should be developed. We have developed an initial list of possible safeguards to help ensure that pay-for-performance systems in the government are fair, effective, and credible.<sup>5</sup> The safeguards include, among other things, the following.

- Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process (e.g., independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay determinations, and promotion actions before they are finalized to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership is predominately made up of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions).
- Assure that there are reasonable transparency and appropriate accountability mechanisms in connection with the results of the performance management process. This includes reporting periodically on internal assessments and employee survey results relating to the performance management system and publishing overall results of performance management and individual pay decisions while protecting individual confidentiality.
- Assure that the agency's performance management systems (1) link to the agency's strategic plan, related goals, and desired outcomes and (2) result in meaningful distinctions in individual employee performance. This should include consideration of critical competencies and achievement of concrete results.

<sup>5</sup> GAO, Defense Transformation: Preliminary Observations on DOD's Proposed Civilian Personnel Reforms, GAO-03-717T (Washington, DC: Apr. 29, 2003).

- Involve employees, their representatives, and other stakeholders in the design of the system, including having employees directly involved in validating any related competencies, as appropriate.

27. Senator LIEBERMAN. Mr. Stewart, do you know of agencies where such mechanisms have proven effective to guard against unfairness and abuse in a pay-for-performance system?

Mr. STEWART. The list of safeguards mentioned above are based on our extensive body of work looking at the performance management practices used by leading public sector organizations both in the United States and in other countries. However, we previously reported that DHS created a Homeland Security Compensation Committee that is to provide oversight and transparency to the compensation process. The committee—consisting of 14 members, including 4 officials of labor organizations—is to develop recommendations and options for the Secretary’s consideration on compensation and performance management matters, including the annual allocation of funds between market and performance pay adjustments. We also reported that high performing organizations seek to create pay, incentive, and reward systems based on valid, reliable, and transparent performance, management systems with adequate safeguards and link employee knowledge, skills, and contributions to organizational results.<sup>6</sup> To that end, we found that the demonstration projects took a variety of approaches to designing and implementing their pay for performance systems to meet the unique needs of their cultures and organizational structures. For example, the Department of Commerce uses a second-level review process as a safeguard. In this review process, the pay pool manager is to review recommended scores from subordinate supervisors and select a payout for each employee. The pay pool manager is to present the decisions to the next higher official for review if the pay pool manager is also a supervisor. In addition, the department had a grievance procedure that allowed employees to request reconsideration of performance decisions, excluding awards, by the pay pool manager through the department’s Administrative Grievance Procedure or appropriate negotiated grievance procedures.

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#### QUESTIONS SUBMITTED BY SENATOR JACK REED

##### LAB EXEMPTION FROM NSPS AUTHORITIES

28. Senator REED. Secretary England, Sec. 9902 of the authorizing legislation for the NSPS specifically exempts a number of defense laboratories from the NSPS until at least October 1, 2008. However, at the hearing, you stated that the labor relations portion of NSPS could be implemented on these same laboratories. It is my understanding that you are proceeding with this action. Please identify the statutory authority that enables the Department to implement any of the pieces of NSPS on the organizations exempted by section 9902.

Secretary ENGLAND. The NSPS statute in 9902(m) provides for the establishment of a labor relations system for the DOD to address the unique role that the DOD civilian workforce plays in supporting the Department’s national security mission. The statute states that the labor relations system developed or adjusted under this subsection shall be binding on all bargaining units within DOD, all employee representatives of such units, and DOD and its subcomponents.

##### COMPARISON OF AUTHORITIES OF LAB DEMONSTRATION PROGRAMS AND NSPS

29. Senator REED. Secretary England, you stated that the NSPS grew in some form from the work done in existing and ongoing laboratory demonstration programs. The NSPS legislation exempts a number of defense laboratories from inclusion into NSPS until at least October 1, 2008, and then only includes them if the Secretary of Defense determines that the flexibilities for laboratories are greater in NSPS than under the demonstration programs. Until that determination is made, is it your intention to allow the laboratories to continue to modify their individual demonstration programs so that they can develop the best workforce to accomplish their unique mission?

Secretary ENGLAND. We will continue to monitor and learn from existing laboratory personnel demonstration projects. The NSPS strategy to preserve HR flexibilities via implementing issuances vice regulations provides the opportunity to learn from the demonstration projects and rapidly improve NSPS based on their experi-

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<sup>6</sup>GAO-04-83.

ences. We fully expect that once the laboratories named in subsection 9902(c)(2) are eligible for coverage under NSPS, the system will provide even greater flexibilities than the current personnel demonstration project authority, including the ability to modify the system faster to meet mission requirements.

In the meantime, laboratories will operate their existing demonstration projects. Additionally, the Department is developing a plan for the effective utilization of personnel management authorities in the defense laboratories, in accordance with section 1107 of the NDAA for Fiscal Year 2005 (Public Law 108-375), October 28, 2004. The Department will be able to determine the feasibility and appropriateness of any modifications to individual demonstration projects following the completion of the section 1107 plan.

30. Senator REED. Secretary England, have you done any comparative analysis of the personnel authorities of NSPS and the personnel authorities possible under full implementation of the demonstration program authorities, including their continual modification and improvement by local laboratory directors, so as to be able to make a determination as to whether NSPS is in fact more supportive of the lab missions?

Secretary ENGLAND. A comparative analysis and assessment cannot be performed at this time, because final NSPS regulations have not yet been issued. The Department is now proceeding to draft and issue the final regulations in accordance with requirements of the NSPS statute. NSPS is a comprehensive HR system that will be supportive of the many different DOD missions. In general, the range of NSPS authorities exceeds those applicable to DOD laboratories under their current demonstration project authority. NSPS can make changes in the same areas that are open to DOD laboratories, as well as in the areas of the labor-management relations system and appeals process.

The Department will conduct a substantive comparison of NSPS and laboratory demonstration project authorities in accordance with section 1107 of the NDAA for Fiscal Year 2005, concerning effective utilization of personnel management authorities in DOD laboratories.

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#### QUESTIONS SUBMITTED BY SENATOR DANIEL K. AKAKA

##### NSPS TRAINING AND EDUCATION

31. Senator AKAKA. Secretary England, I have been contacted by several Federal managers who state that they are not receiving, and believe that they will not receive, sufficient information and training on the implementation of the NSPS. Would you explain what the DOD is doing and will do, in addition to posting information on the NSPS website, to train and educate managers on the system that is coming July 1, 2005?

Secretary ENGLAND. The NSPS training plan is a comprehensive, well-planned learning strategy to prepare the DOD workforce for the transition to pay for performance. The plan is grounded in the belief that participants need to be informed and educated about NSPS and trust and value it as a system that fosters accountability, respects the individual, and protects his and her rights under the law. The plan incorporates a blended learning approach featuring Web-based and classroom instruction supplemented by a variety of learning products, informational materials, and workshops to effectively reach intended audiences with engaging, accurate, and timely content. Employees will receive training through three primary vehicles:

Print Materials—directed to various targeted audiences to raise awareness and educate them on key NSPS elements and performance management concepts.

Web-based Training—Two hour-long courses, “Fundamentals of NSPS” and “NSPS 101” providing introductory, on-line training delivered in a consistent manner in a self-paced, on-demand format. The “NSPS 101” course serves as a prerequisite for the classroom sessions.

Classroom Sessions—the primary vehicle to communicate critical information, classroom sessions are under development for employees, managers, and supervisors, and human resources practitioners, and labor relations practitioners. The sessions will provide key operational information on all NSPS systems elements. Classroom training will be conducted using a train-the-trainer strategy, with trainers who participate in a train-the-trainer program leading all classroom training. Trainers will be provided with fully scripted instructor guides and include basic instructional content supplemented by video vignettes and interactive exercises. Classroom train-

ing is scheduled to occur approximately 4 to 6 weeks prior to NSPS implementation.

#### THE VOLCKER COMMISSION

32. Senator AKAKA. Secretary England, the Volcker Commission gave several examples as models for labor-management reform, including the use of labor-management councils. The Commission noted that in these examples, both labor and management went the extra mile to work with each other which led to enhancement in communication and consensus. Did DOD consider the recommendations of the Volcker Commission in working with labor unions?

Secretary ENGLAND. Yes.

#### NATIONAL SECURITY LABOR RELATIONS BOARD

33. Senator AKAKA. Secretary England, the law creating NSPS clearly states that the labor relations system developed shall provide for independent third-party review of decisions. However, the draft regulations create a new labor board, the NSLRB, within the Department with three members appointed by the Secretary who are not subject to any external review. Please explain how the NSLRB is an independent third-party review panel.

Secretary ENGLAND. While the Secretary will establish the NSLRB, safeguards are established in the proposed regulations to ensure that the NSLRB operates with independence. The members are appointed to fixed terms of 3 years, and can be extended for two additional 1-year appointments. Members will be independent, distinguished citizens known for their integrity, impartiality and expertise in labor relations and/or the DOD mission, and/or relevant national security matters. The members are subject to the same stringent criteria for removing members of the Federal Labor Relations Authority (FLRA) and Merit Systems Protection Board, i.e. inefficiency, neglect of duty, or malfeasance. Finally, all decisions of the NSLRB are reviewable by the FLRA and the Federal circuit courts of appeals. All of these safeguards ensure that a fair review of labor disputes will be made by the NSLRB without undue influence by the Secretary or DOD management.

#### PAY-FOR-PERFORMANCE

34. Senator AKAKA. Secretary England, Iris Bohnet and Susan Eaton of the Kennedy School of Government at Harvard University recently published a paper titled "Does Performance Pay Perform?" The paper states that pay-for-performance requires the existence of certain key conditions to be an effective system for high motivation and outcomes. These conditions include assumptions about the output desired, the people providing the output, and the organizational context of the workers. However, the report found that these conditions are often not met in the public sector, in part because of the complexity of the typical government product, the nature of public goods, the increasing role of teamwork and cross-agency collaboration, and the social comparisons and internal dynamics of employees, whether public or private. What is your response to these findings in regards to NSPS?

Secretary ENGLAND. In keeping with the statutory mandate of 5 USC 9902 to better link individual pay to performance, DOD is creating pay, incentive, and reward systems that clearly link employee achievements, contributions, knowledge, skills, and contributions to organizational results. At the same time, the Department recognizes that valid, reliable, and transparent performance management systems with adequate safeguards for employees are the precondition to such an approach. As it designs and implements NSPS the Department is taking the following steps:

- Training managers to provide candid and constructive feedback to help employees maximize their contribution and potential
- Emphasizing the need for ongoing and meaningful dialogue between managers and employees
- Implementing a new competency-based performance management system that is intended to create a clear linkage between employee performance and our strategic plan and core values
- Increasing employee understanding and ownership of the organizational goals and objectives
- Adopting automation tools that facilitate "best practices" in the pay for performance environment
- Reinforcing the use of team and organizational rewards



- Preserving non-cash rewards as tools to recognize performance.

## SAFETY AND HEALTH OF DOD EMPLOYEES

35. Senator AKAKA. Secretary England, I am concerned that NSPS may have an adverse impact on the safety and health of DOD employees. Under the proposed regulations, unions are limited in their ability to bargain over procedures and technology that can have an adverse impact on the safety and health of DOD workers. In addition, a pay-for-performance system could lead to a situation that rewards production and timing over the quality of work or the ability of individuals to carry out their duties with the utmost care and safety. What assurances can you provide that the safety and health of DOD workers will not be compromised by the implementation of NSPS?

Secretary ENGLAND. The Department takes the health and safety of its employees very seriously. While collective bargaining agreements may provide for provisions regarding safety, these agreements cannot conflict with the statutory safeguards regarding safety that already exist for all of our employees. The Department regularly takes steps to ensure the health and safety of its employees even for employees not covered by collective bargaining agreements. These safeguards will not go away due to NSPS. Also, the proposed regulations attempt to strike a balance between employee interests and DOD's need to accomplish its mission effectively and expeditiously. For example, while the proposed regulations eliminate bargaining on procedures regarding operational management rights (which cover safety and health matters), the proposed regulations also continue to provide for bargaining on impact and appropriate arrangements for all management rights (such as safety and health issues). Finally, the proposed regulations provide for consultation on procedures regarding the operational management rights, which lie at the very core of how DOD carries out its mission. The regulations continue to provide the unions a voice on safety issues through bargaining or consultation.

A pay for performance system is not inconsistent with and, in fact, can support the Department's concern for safety issues. Although factors such as timing and levels of production are frequently key elements of performance objectives, these objectives must also take into account the need for adherence to safety guidelines and the willingness to identify concerns about work practices that raise safety issues. The Department's training for supervisors will include sessions on how to write performance objectives that address health and safety.

## RESTRUCTURING DOD'S PERSONNEL SYSTEM

36. Senator AKAKA. Secretary England, one of the Department's concerns when asking for authority to restructure DOD's personnel system in August 2003, was the lengthy and complicated process required for hiring people to fill critical skill areas, especially in areas needed in support of the global war on terrorism. Other than the ability of the Secretary to quickly hire individuals identified as "qualified experts," what are some of the authorities that DOD will use under NSPS in order to streamline the hiring process?

Secretary ENGLAND. The proposed regulations give DOD the ability to establish direct hiring authorities that can be used in situations where there are critical needs or severe shortages. DOD will also be able to create new authorities as necessary by publishing (jointly with OPM) a notice for in the Federal Register. If a critical mission need arises, DOD can implement new hiring authorities without a preceding comment period. In these cases, a comment period would follow the implementation of the authority and the authority could be modified subsequently based on comments received. The proposed regulations also give DOD the ability to streamline the process for examining applicants. Any process developed by DOD must be consistent with merit system principles and veterans' preference.

## SPIRAL ONE

37. Senator AKAKA. Secretary England, under the spiral implementation plan for NSPS, Spiral One will begin around July 2005 covering some 60,000 employees. The second spiral will begin after the Department has assessed Spiral One and after the Secretary of Defense certifies DOD's performance management system. What is the process the Department will follow for assessing Spiral One?

Secretary ENGLAND. The Department's workforce composition is very complex, and NSPS is intricate. We have adopted a spiral approach to phase in NSPS employment, compensation, performance, and other provisions besides labor relations. Spi-

ral One will be white-collar jobs, and will phase in units in three increments. The first, Spiral 1.1, will be robust in size and mix. The Department will conduct the performance management system assessment based on Spiral 1.1 units, upon completion of their first performance rating and payout cycle. This assessment will enable the Secretary of Defense to determine if the performance management system meets the statutory criteria so that we can apply NSPS beyond the cap of 300,000 employees.

The Department has a second, separate assessment objective for Spiral One: to determine if NSPS is operating within the Department's key performance parameters, and if there are good practices to share or systemic weaknesses that require correction. For this purpose, the Program Executive Officer is developing a comprehensive, long-term evaluation plan. It will include periodic activities like attitude surveys and statistical analysis of human resource transactions under NSPS; scheduled special studies of key practices and effects of NSPS; and participant observation focus groups. We shall use existing sources whenever possible, like the Defense Civilian Personnel Data System and DOD Status of Forces Civilian opinion survey, and incorporate or extract NSPS-related data. Once Spiral One is completed, we shall prepare an interim NSPS assessment report that draws on the findings of the preceding evaluation activities.

38. Senator AKAKA. Secretary England, what criteria will the Secretary use to certify DOD's performance management system?

Secretary ENGLAND. The Department is developing the criteria. We plan to use feature and outcome oriented criteria, calling on our experience with demonstration project performance management systems and recent OPM guidelines for certifying pay for performance systems. For example, we can determine if the system features a process for feedback and review timetables, and a means for assuring adequate system resources, by looking at system design and policies. Once the system is up and running, we can use outcome-oriented criteria, for example, assessing adequate training in terms of positive participant feedback, or effective safeguards in terms of comparative rating and payout patterns and results of reconsideration processes.

#### PERSONNEL SYSTEM AT THE DEPARTMENT OF HOMELAND SECURITY

39. Senator AKAKA. Mr. Blair, in response to a question I posed at an Oversight of Government Management Subcommittee (Homeland Security and Governmental Affairs Committee) hearing last month, the DOD submitted several examples of cases where it believes MSPB administrative judges did not take the Department's mission into account in deciding cases. One example involved the Department's proposed removal of an employee with 28 years of experience who took a \$5 piece of surplus tubing. The MSPB reduced the penalty to a 90-day suspension. Is it the administration's intent to fire employees, with otherwise outstanding service, for minor offenses under both the NSPS at DOD or the new personnel system at the DHS?

Mr. BLAIR. No, the administration does not intend to remove employees for minor offenses. Every case is of course unique and what seems like a minor offense may, under certain circumstances have a major impact on the mission of the agency. For example, sleeping at one's desk may be a minor offense for a file clerk, but is a major offense when committed by a security guard. The final DHS regulations and the proposed NSPS regulations recognize the critical nature of those agencies' missions and simply require that, prior to mitigating a penalty, MSPB give due deference to the assessment made by the agency of the impact the misconduct had on that mission.

#### ESTABLISHMENT OF CAREER GROUPS

40. Senator AKAKA. Mr. Blair, under the proposed NSPS regulations, DOD may establish career groups based on various factors such as mission, nature of work, qualifications or competencies, and other characteristics. The Department states that it will document in the implementing issuances the criteria and rationale for grouping occupations or positions into career groups. When will this criteria be available for the Department's employee representatives?

Mr. BLAIR. As specified in the proposed NSPS regulations, the career groups and the criteria for the groups will be provided in implementing regulations. Proposed § 9901.106(a)(3)(i) states that "Within timeframes specified by the Secretary, employee representatives will be provided with an opportunity to submit written com-

ments to, and to discuss their views with, DOD officials on any proposed final draft implementing issuances.”

41. Senator AKAKA. Mr. Blair, will they be provided the opportunity to make comment or will the criteria be adopted without comment?

Mr. BLAIR. As stated in proposed § 9901.106(a)(3)(i) “Within time frames specified by the Secretary, employee representatives will be provided with an opportunity to submit written comments to, and to discuss their views with, DOD officials on any proposed final draft implementing issuances.”

#### WORKING CONDITIONS

42. Senator AKAKA. Mr. Gage, you testified that the NSPS will eliminate the ability of unions to negotiate over critical working conditions. Will you please explain the differences between current law and NSPS regarding bargaining over working conditions and the impact of these changes will have on DOD workers?

Mr. GAGE. The provisions in NSPS severely restrict the unions’ ability to bargain over working conditions, and thereby restrict the unions’ ability to ensure a healthy and encouraging working environment for the employees they represent. The proposed restriction on collective bargaining contained in DOD’s proposed NSPS regulations takes several very important issues that significantly effect working conditions “off the table,” including: overtime, shift rotation, flexi-time, alternative work schedules, and deployment away from regular work locations. Although these issues greatly impact the quality of work life for the employee, the proposed NSPS regulations undermines the unions’ right to negotiate over these provisions.

#### HIGHER STANDARD PROPOSED

43. Senator AKAKA. Mr. Gage, I am deeply concerned about the higher standard proposed by DOD under NSPS for the MSPB to meet in order to mitigate penalties imposed by the Department. In your opinion, what impact will this change have on the ability of employees to have their cases fairly and justly adjudicated?

Mr. GAGE. The standard for mitigation by the MSPB of discipline and penalties imposed on employees under NSPS in the proposed regulations is virtually impossible to meet and effectively removes the possibility of mitigation. In a court of law, the standard of review to determine if the penalty a Department imposes is to assess if the action was “unreasonable.” Under the new proposal the bar would be raised and employees would have to prove that the adverse action is “wholly unjustified.” This new standard will completely eviscerate the employee’s ability to have his or her cases fairly and justly adjudicated. The new standard shifts a disproportionate amount of the burden for proving any wrongdoing onto the employee while management officials or any other person in a supervisory position will be given an additional opportunity to treat workers unfairly without any fear of reprisal. Determining if an adverse action is “unreasonable” is an equitable standard of review, backed by 25 years of precedence upon which decisionmakers can base their conclusions. The “wholly unjustified” standard proposed by Secretary Rumsfeld is vaguely defined and opens the door to arbitrary and capricious decisionmaking. This type of adjudication defeats the purpose for which the MSPB was originally established: to provide a fair and unbiased forum where employees can appeal to have the merit system principles upheld.

#### NSPS APPEALS PROCESS

44. Senator AKAKA. Ms. Sistare, you made several suggestions in your written testimony as to how the DOD can improve the perception of fairness in the NSPS appeals process. What specific suggestions do you have regarding the proposed standard for the mitigation of penalties by the MSPB and the ability of DOD to overturn a decision by a MSPB administrative judge?

Ms. SISTARE. It is my view that the first level of adjudication and appeal is most critical to employees. It is difficult for an employee to “take on” his or her employing agency, and employees should not have to look to higher levels of appeal for fair resolution of their cases. I believe it is appropriate to continue MSPB in its role as a forum for appeals. If the written standards for MSPB’s review are clear and comprehensive, and take DOD’s mission into consideration, the need for reconsideration by DOD could be avoided.

## EMPLOYEE TRAINING

45. Senator AKAKA. Ms. Sistare and Mr. Stewart, an issue raised repeatedly in discussions over the personnel changes at DOD and DHS is the need for adequate training for all employees on the new personnel system. Have you looked into this issue, and if so, what recommendations do you have regarding the amount, type, or regularity of personnel training that is needed to launch and sustain a new personnel system?

Ms. SISTARE. The recommendations of the National Commission on the Public Service (Volcker Commission), panel reports by the National Academy of Public Administration, and certainly the experience and recommendations of the GAO have all emphasized the importance of early, sustained, and ongoing training to the successful implementation of performance based pay. In fact, the successful development and implementation of any personnel change requires understanding, buy-in, and ongoing communication—all of which require training. Some of this training—that which is primarily introductory and informational or describes processes—can be written or on-line. Those who have studied and implemented such systems believe, however, that the ability to interact and communicate that is required to implement a performance based pay system must be taught in a direct and interactive setting. I believe that to be fully successful, it will require the additional steps of role playing and coaching.

Mr. STEWART. As we noted in our report, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*,<sup>7</sup> training and developing new and current staff to fill new roles and work in different ways will be a crucial part of the Federal Government's endeavors to meet its transformation challenges. DOD and DHS are significant components of this transformation.

In April 2004, GAO and the National Commission on the Public Service Implementation Initiative hosted a forum on whether there should be a governmentwide framework for human capital reform and, if so, what this framework should include. As part of the criteria that agencies should have in place as they plan for and manage their new human capital authorities, participants generally agreed that adequate resources for planning, implementation, training, and evaluation were needed. Additionally, they noted that agencies should ensure adequate training as they implement new human capital authorities.

Selected OPM personnel demonstration projects trained employees on the performance management system prior to implementation to make employees aware of the new approach, as well as periodically after implementation to refresh employee familiarity with the system. The training was designed to help employees understand their applicable competencies and performance standards; develop performance plans; write self-appraisals; become familiar with how performance is evaluated and how pay increases and awards decisions are made; and know the roles and responsibilities of managers, supervisors, and employees in the appraisal and pay-out processes. According to the DHS regulations, its performance management system is designed to incorporate adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the system.

GAO currently is reviewing training and development issues at DHS. Our work includes a review of DHS's training efforts on its new personnel system, MAXHR. Our report is scheduled to be released this fall.

## EMPLOYEE PERFORMANCE

46. Senator AKAKA. Ms. Sistare and Mr. Stewart, both the DHS and DOD personnel systems permit managers to convey performance expectations to employees orally. I think this can put employees at a disadvantage, especially as their pay will be more closely tied to their performance. How can employees be held accountable for performance expectations provided orally?

Ms. SISTARE. I believe it is necessary to distinguish clearly between performance standards and tasks. Performance standards, as the term is used by GAO and others for the implementation of a performance based pay system, need to be clearly aligned with the work expectations of the employee and the agency's mission. This level of performance standard should, in my view, be clearly communicated and written. Individual tasks assigned pursuant to performance standards can be oral, and it would in many cases be overly cumbersome to require that they be written. In between these two standards, I would recommend written as well as oral commu-

<sup>7</sup> GAO, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*, GAO-04-546G (Washington, DC: March 2004).

nication, when it is not unreasonably burdensome, as clarity, communication, and the opportunity for interaction are regarded as key to successful administration of performance based pay.

Mr. STEWART. To help enhance credibility and fairness and avoid any problems, some sort of written documentation of performance expectations is appropriate, in addition to orally communicating performance expectations. However, the means can vary.

#### GUARD AGAINST ABUSE

47. Senator AKAKA. Mr. Stewart, you testified as to the lack of details in the NSPS proposed regulations, including the absence of adequate safeguards to ensure fairness and guard against abuse in measuring performance and paying employees. What sort of oversight do you believe is needed to promote consistency of the performance management system and do you believe external review of pay and performance decisions is necessary?

Mr. STEWART. In April 2003, when commenting on DOD civilian personnel reforms, we testified that Congress should consider establishing statutory standards that an agency must have in place before it can implement a more performance-based pay program, and we developed an initial list of possible safeguards to help ensure that pay-for-performance systems in the government are fair, effective, and credible.<sup>8</sup> One of the safeguards we identified is to assure that certain pre-decisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process. For example, independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay determinations, and promotion actions before they are finalized to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership is predominately made up of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions.

48. Senator AKAKA. Mr. Stewart, what kind of external review would you propose?

Mr. STEWART. We reported that independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system and the effective implementation of a compensation committee similar to the Homeland Security Compensation Committee are important to assuring that predecisional internal safeguards exist to help achieve consistency and equity and assure nondiscrimination and nonpoliticization of the performance management process.<sup>9</sup>

In our report on implementing pay for performance at selected personnel demonstration projects, we mentioned that some of the demonstration projects implemented as safeguards a second-level review and grievance process, as these examples illustrate.

Second-level review process:

- Second-level supervisors are to review all assessments. In addition, an overall assessment of "highly successful" is to be sent to the appropriate department's Performance Review Board for the assignment of an official rating of "1" or "2." The supervisor and reviewer are to assign a "4" or "5" rating based on a problem-solving team's findings and a personnel advisor's input.
- Pay pool managers review recommended scores from supervisors and select a payout for each employee. The pay pool manager is to present the decisions to the next higher official for review if the pay pool manager is also a supervisor.

Grievance process:

- Employees may request reconsideration of their ratings in writing to the third-level supervisor and indicate why a higher rating is warranted and what rating is desired. The third-level supervisor can either grant the request or request that a recommending official outside of the immediate or-

<sup>8</sup>GAO-03-717T.

<sup>9</sup>GAO-04-320T.

ganization or chain of authority be appointed. The employee is to receive a final decision in writing within 21 calendar days.

- Employees may grieve their ratings and actions affecting the general pay increase or performance pay increases. An employee covered by a negotiated grievance procedure is to use that procedure to grieve his or her score. An employee not under a negotiated grievance procedure is to submit the grievance first to the rating official, who will submit a recommendation to the pay pool panel. The pay pool panel may accept the rating official's recommendation or reach an independent decision. The pay pool panel's decision is final unless the employee requests reconsideration by the next higher official to the pay pool manager. The official would then render the final decision on the grievance.

#### EMPLOYEE APPEALS PROCESS

49. Senator AKAKA. Mr. Stewart, the proposed regulations provide for an accelerated MSPB adjudication process for employee appeals. I have long been concerned about the impact a shortened processing time for one agency may have on employees at other agencies with cases pending before the MSPB. Do you believe the NSPS regulations will have an adverse effect on employee appeals both at DOD and at other Federal agencies?

Mr. STEWART. The U.S. Merit Systems Protection Board will not know the actual impact until a number of cases are adjudicated.

#### QUESTIONS SUBMITTED BY SENATOR BILL NELSON

##### PERFORMANCE BASED PAY SYSTEM

50. Senator BILL NELSON. Secretary England and Mr. Blair, while the GAO has been successful in implementing a pay for performance system, the National Association of Public Administration's studies and the GAO's own experiences illustrate several factors that need to be addressed when adopting performance based pay in the Federal Government. I am concerned that the lack of detail in the current process fails to address these factors, and as a result will have a significant impact on DOD's implementation plans and the ultimate success of the NSPS. I would appreciate your assessment of DOD's concept and plans for a performance based pay system, specifically with regard to risk. Do you envision high, medium, or low risk for successful implementation—and impact on mission accomplishment—in terms of: Timeline for implementation? Complexity? Cultural change required? Adequacy of funding levels? How do you intend to minimize or mitigate risks?

Secretary ENGLAND. NSPS represents a very significant change in the DOD. However, the risk of potential negative impact on mission accomplishment is minimal, and is far out-weighted by the advantages that a modern human resources system and pay for performance culture will bring to the Department. The Department and the components have established a risk management process to identify, address, and manage NSPS risks. After risks are identified, mitigation strategies are proposed and evaluated. Each risk may have very different mitigation options, and might include such things as: training, schedule changes, increased funding, or policy changes. The risks associated with the implementation timeline, implementation complexity, cultural change, and adequacy of funding levels are address below.

##### *Timeline For Implementation*

The greatest risks associated with the NSPS implementation and deployment timeline are associated with system and organizational readiness. Therefore, the Department has determined that the NSPS implementation and deployment schedule is event-driven. This means that NSPS will only be deployed when it is ready—meaning all stakeholders have been adequately trained, the IT systems and policies and procedures have been developed and tested, and organizations are ready to make the cultural change to NSPS.

##### *Complexity*

NSPS is a large and complex program, and therefore will take a great deal of time and effort to deploy. However, managing large projects is something that the Department of Defense does very well every day. To address the implementation complexities of NSPS, along with the NSPS Program Executive Officer (PEO), each component has established a dedicated program manager and full-time staff to help manage NSPS deployment. In addition, components have identified implementation leads at several different levels within their component, from the major command/

claimant level down to the installation and activity level. The PEO is also developing a Web-based readiness tool that will help organizations and their chain of command understand implementation tasks and monitor their readiness to implement NSPS.

#### *Cultural Change*

NSPS brings with it a very significant cultural change, and as with any change there exists the risk that a population will reject it. In order to lessen this risk and better prepare the workforce for the cultural change that comes with NSPS, each component has rolled out change management training. In addition, the PEO and components have kept the workforce informed about NSPS by communicating current and pertinent information as soon as it is available, including a very robust Web site. The PEO and components have also prepared information packages for local commanders and encouraged them to share information, such as what NSPS will and will not change, with their workforces.

#### *Adequacy of Funding Levels*

One of the key requirements of the NSPS performance management system is to be able to provide meaningful financial rewards to good performers. Without the proper funding, this requirement cannot be realized. The NSPS statute requires that "to the maximum extent practicable, for fiscal years 2004 through 2008, the overall amount allocated for compensation of the DOD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS." In order to operationalize this requirement, an issuance will be developed to provide fiscal guidance to the components. In addition to the financial policy, funding requirements will also be reinforced through training.

Mr. BLAIR. Highly experienced and knowledgeable OPM subject-matter experts have worked, and will continue to work, very closely with DOD experts to develop the framework for the NSPS performance-based compensation system. OPM has similar and recent experience with the DHS and a long history of monitoring and evaluating demonstration projects that employ similar pay systems. These experiences give me great confidence in the jointly-developed NSPS framework.

One of the strongest features of NSPS is that a number of its details will be developed within the context of a continuing collaboration process with employee representatives. This, together with DOD's decision to phase in the implementation of its pay-for-performance system through a series of "spirals," makes the overall risk associated with implementation extremely low. Our experience and research allow us to go forward with confidence that NSPS will enjoy successful implementation. DOD also will mitigate any risk by investing resources toward training of the workforce in all aspects of the new system.

51. Senator AKAKA. Mr. Stewart, Mr. Gage, and Ms. Sistare, what do you recommend to minimize or mitigate risks?

Mr. STEWART. The key to a successful organizational transformation is to implement strategies to help individuals maximize their full potential in the new organization, while simultaneously managing the risk of reduced productivity and effectiveness that often occurs as a result of the changes. While there is no one right way to manage a successful merger, acquisition, or transformation, the experiences of both successful and unsuccessful efforts suggest that there are practices that are key to their success. These key practices include the following:

1. Ensure top leadership drives the transformation. Leadership must set the direction, pace, and tone and provide a clear, consistent rationale that brings everyone together behind a single mission.
2. Focus on a key set of principles and priorities at the outset of the transformation. A clear set of principles and priorities serves as a framework to help the organization create a new culture and drive employee behaviors.
3. Set implementation goals and a timeline to build momentum and show progress from day one. Goals and a timeline are essential because the transformation could take years to complete.
4. Dedicate an implementation team to manage the transformation process. A strong and stable team is important to ensure that the transformation receives the needed attention to be sustained and successful.

5. Establish a communication strategy to create shared expectations and report related progress. The strategy must reach out to employees, customers, and stakeholders and engage them in a two-way exchange.<sup>10</sup>

Mr. GAGE. The design and creation of NSPS has been a covert maneuver from its very inception. DOD has released regulations but has failed to concretely define them. We are deeply concerned that the “pay for performance” system may be twisted into a forced distribution system where employees receive awards and pay adjustments not based on their merit but based on a system of outright bias. We are strongly opposed to this system not only because of the enormous discretion it places in the hands of current and future officials but because of the monumental risks associated with its implementation. In order to minimize or mitigate these risks we strongly recommend that employees and/or their representatives have a strong influence in the implementation of this process. In order for the new pay system to be as transparent and objective as the General Schedule system, we recommend that decisions regarding pay be made in collective bargaining, where employees and their representatives can be equal partners in the process and have the opportunity to influence its outcome.

Ms. SISTARE. The National Academy of Public Administration and the National Commission on the Public Service (Volcker Commission) hosted a forum on successful implementation of performance based pay in the fall of 2003. There was wide agreement among participants that while implementing performance based pay is difficult, the results in terms of mission performance and employee satisfaction are fully worth it. The imperatives for successful implementation, as articulated in the report on this forum, are as follows:

- A credible appraisal methodology
- A transparent system
- A timely set of processes
- Consultation with those affected
- Peer review
- Ongoing communications, including feedback from all involved
- Training of managers and supervisors, who themselves are evaluated on how they manage performance
- Training of employees to participate in the system

To this list, Paul Volcker added the importance of careful and ongoing oversight by the responsible leadership in the executive branch and by Congress.

Participants also identified several factors for which implementers must be prepared:

- Adequate time: adoption of pay for performance will take time
- Verifiable performance systems: individual performance must be linked to organization goals and sound performance management systems, including agreement and buy-in among all those who are part of the system
- Culture change
- Adequate funding
- Careful assessments: pay for performance is complicated because it is difficult to make meaningful distinctions in evaluating performance once one gets below the top performers in an organization.

#### WHISTLEBLOWER PROTECTION

52. Senator AKAKA. Secretary England and Mr. Blair, it is the employees of agencies—the folks on the ground—who have the most thorough knowledge of how our government operates on a day-to-day basis. It is these government workers, when they see failures or shortcomings who step up to the plate as a whistleblower. Whistleblowers are key to good government. They point out waste, fraud, abuse, and weaknesses in the operations of our agencies. In recent years there have been several examples of rank-and-file government employees who have pointed out problems with government systems that subsequently were improved. If government workers fear for their jobs, and don’t trust the personnel systems to protect them, we lose our most effective watchdogs. What assurances can you give employees that they will be protected should they feel compelled to come forward with information?

Secretary ENGLAND. It is a common misconception that whistleblower protection is changed or impacted by NSPS. Current law and policy ensures management can-

<sup>10</sup>GAO, Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations, GAO-03-669 (Washington, DC: July 2, 2003).



not take or threaten to take an action because someone is a whistleblower. We do not want this to change and it has not and cannot be changed by NSPS.

Mr. BLAIR. DOD employees will continue to enjoy the same protections from whistleblower reprisal as they do today. The proposed NSPS regulations maintain the current protections for whistleblowers under the law as NSPS legislation charged OPM and DOD to do. The proposed regulations do not change the avenues of redress available to employees who believe they have been subjected to reprisal for whistleblowing. Employees will know that they are protected in the same manner as today should they feel compelled to come forward with information under the NSPS.

53. Senator AKAKA. Secretary England and Mr. Blair, what are the various mechanisms the new system will use to guarantee a Federal worker who speaks his or her mind won't be subjected to retribution by their supervisors?

Secretary ENGLAND. The Department cannot and does not wish to change rules regarding prohibited personnel practices. Rules remain unchanged regarding prohibited personnel practices and are reviewable by outside independent agencies such as the Office of Special Counsel and the Merit Systems Protection Board.

Mr. BLAIR. As noted above, employees will be able to file complaints of whistleblower reprisal to the Office of Special Counsel which can investigate such complaints and file on behalf of the employee before the Merit Systems Protection Board. If the Special Counsel declines to pursue a complaint, an employee is entitled to file an appeal directly with the MSPB. In addition, employees will be entitled to raise whistleblower reprisal as an affirmative defense in any adverse action appeal to the MSPB. These are the same mechanisms that are in place today so employees will see no change in this regard.

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#### QUESTIONS SUBMITTED BY SENATOR HILLARY RODHAM CLINTON

##### DEFENDING COMPUTER NETWORKS

54. Senator CLINTON. Secretary England, Rome Lab in New York has a unique mission to help defend the computer networks that support many of our warfighting efforts. This mission requires them to compete with private industry for a limited pool of highly compensated cybersecurity specialists. I understand that Rome, as part of the overall Air Force Research Lab, is operating under a congressionally authorized special personnel system that has enabled them to recruit, hire, and retain these types of people, as well as electrical engineers and other scientists. These systems are controlled at the local level and as such are very responsive to the specialized needs of each lab—for example, hiring computer specialists to come to Rome. How will these ongoing special personnel demonstration programs be handled in the NSPS?

Secretary ENGLAND. As noted at question 30, above, NSPS is a comprehensive HR system that will be supportive of the many different DOD missions. In general, the range of NSPS authorities exceeds those applicable to DOD laboratories under their current demonstration project authority. NSPS can make changes in the same areas as are open to DOD laboratories, and also in the areas of the labor-management relations system and appeals process.

The Department will conduct a substantive comparison of NSPS and laboratory demonstration project authorities in accordance with section 1107 of the NDAA for Fiscal Year 2005, concerning effective utilization of personnel management authorities in DOD laboratories.

##### PERSONNEL PROGRAMS

55. Senator CLINTON. Secretary England, the National Defense Authorization Act for Fiscal Year 2004 excluded these programs from inclusion in NSPS so places like Rome could continue to provide the best support to our warfighters. Congress was unwilling to disrupt an ongoing successful program at such a critical juncture. How do you plan to enable places like Rome to continue and expand their unique personnel programs so they can best perform their missions?

Secretary ENGLAND. We will continue to monitor and learn from our existing laboratory personnel demonstration projects, including the Rome Research Site. The NSPS strategy to preserve HR flexibilities via implementing issuances vice regulations provides the opportunity to learn from the demos and rapidly improve NSPS based on their experiences. We fully expect that once the Air Force Research Laboratory (which includes Rome Research Site) is eligible for coverage under NSPS,

the system will provide even greater flexibilities than the current personnel demonstration project authority, including the ability to modify the system faster to meet mission requirements. In the meantime, the Laboratory will operate under its demonstration project authority, with the ability to modify its system if necessary. The Department is developing a plan for the effective utilization of flexible personnel management authorities in the Defense Laboratories, in accordance with section 1107 of the National Defense Authorization Act for Fiscal Year 2005.

[Whereupon, at 12:05 p.m., the committee adjourned.]

